Selection of Leading Cases

Land Tenures, Land Revenue

and

Prescription

Published by the
University of Calcutta
1921

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For the use of B.L. Students

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SELECTION OF LEADING CASES.

LAND TENURES, LAND REVENUE AND PRESCRIPTION.

RAJA LELANUND SING BAHADOOR

v.

THE GOVERNMENT OF BENGAL.[1]

[*Reported in 6 Moo. I.A., 101; 1 P.C.J., 506; 4 W.R.P.C., 77.*]

1865. July, 28.

At the conclusion of the argument, judgment was postponed, and was now delivered by

THE RIGHT HON. T. PEMBERTON LEIGH.—The question to be decided in this case is the validity of a claim made by the East India Company to resume, for the purposes of revenue assessment, against the Raja of Khuruckpore, 755 bighas of land, (between three and four hundred acres), part of his *Zemindary*. Their Lordships had no doubt, at the hearing of the appeal, as to the advice which it would be their duty to tender to Her Majesty; but it was stated that there were ten other suits which would be governed by the present decision, and it was obvious, from the nature of the claim, that if it could be maintained, it might affect a very great extent of land throughout the Provinces included in the Decennial Settlement. Their Lordships were, therefore, anxious to explain fully the grounds of their opinion, and by enabling parties to judge what cases will or will not fall within their decision, to prevent, as far as possible, further litigation.

[1] *Present*:—The Right Hon. T. PEMBERTON LEIGH, the Right Hon. the Lord Justice KNIGHT BRUCE, the Right Hon. SIR EDWARD RYAN, the Right Hon. the Lord Justice TURNER, and the Right Hon. SIR JOHN PATTESON.

1856.

Raja Lalanund Sing Bahadoor v. The Government of Bengal

The lands sought to be resumed, are of what is called *Ghatwally* tenure, and the great question in the case is, whether lands of this description are liable to be resumed under Regulation I of 1793, sec. 8, cl. 4, relating to *Tannah*, or police establishments.

As the question depends on the effect of the Settlement of 1793, and the changes which were then introduced, it will be convenient to advert to the state of these Provinces, and the mode in which they were administered previously to that time. The three Provinces of Bengal, Behar, and Orissa, were ceded by the Mogul to the East India Company, in the year 1765.

At this time the territorial division of the country was into moozas, or villages, occupied by Royts; Pergunnahs, each of which included several villages; *Zemindaries*, varying in extent, from a moderate English estate, to Districts equal to or larger than many European principalities. The *Zemindary* of Beerbhoom, which immediately adjoins Khoruckpore, is stated in a doccuoget, dated in 1786, to which we shall have occasion to refer, to be twice as large as the Kingdom of Sardinia. Khuruckpore was probably of inferior but still of vast extent.

Many of the greater *Zemindars*, within their respective *Zemindaries*, were entrusted with rights, and charged with duties, which properly belonged to the Government. They had authority to collect from the Ryots a certain portion of the gross produce of the lands. They, in many cases, imposed taxes and levied tolls, and they increased their income by fees, perquisites, and similar exactions, not wholly unknown to more recent times and more civilized nations. On the other hand, they were bound to maintain peace and order, and administer justice within their *Zemindaries*, and, for that purpose, they had to keep up Courts of civil and criminal justice, to employ *Kazees*, *Canoongoes*, and *Tannahdars*, or a police force. But while, as against the Royts and other inhabitants within their territories, many of these potentates exercised almost regal authority, they were, as against the Government, little more than stewards or administrators. Their *Zemindaries* were granted to them only from year to year; the amount of their *jumma*, or yearly payment to Government, was varied, or might be varied, annually; it was an arbitrary sum fixed by the Government officers, calculated upon the gross produce of the *Zemindary* from all

sources, after making an allowance to the *Zemindar* for his maintenance, and for the expenses of the collection and of discharging the public duties with which he was entrusted by the Government. Amongst the lands thus granted to the *Zemindars* were often included lands which had been appropriated to the payment and support of public officers of the *Zemindaries*, or villages included in them. These lands were called *Chackeran* lands; and it appears that under the ancient system such lands were usually exempted from assessment in favour of the *Zemindar*, though they had no legal title to exemption. But there was another class of lands, called *La-khiraj*, which, by reason of a special exemption in a royal grant, or by having been legally devoted to religious uses, or by other means, had become or were claimed by their owners to be free from *Khiraj*, or assessment to the Government.

The police of the country was maintained by means of *Thannahdars*, or police officers, kept by the *Zemindars*, and appointed and paid by them; but, where no other provision existed for their maintenance, the expense was in effect defrayed by the Government, either by direct allowances to the *Zemindar*, or by deduction from his *peshcush*, or by excluding from assessment, or assessing below their value, lands appropriated to that purpose by the *Zemindar*.

In addition to the police force thus kept by the *Zemindar*, at the expense of the Government, and which seems to have been usually very inefficient, private individuals and communities were accustomed to keep watchmen for the protection of their persons and property, under the name of *Chokeedars*, and various other names, who were paid by their employers, and from whom no allowance was made by the Government.

Besides the disorder which prevailed generally through the Provinces, particular Districts were exposed to ravages of a different description. The mountain or hill districts in India were at this time inhabited by lawless tribes, asserting a wild independence, often of a different race and different religion from the inhabitants of the plains, who were frequently subjected to marauding expeditions by their more warlike neighbours. To prevent these incursions it was necessary to guard and watch the *Ghats*, or mountain passes, through which these hostile descents were made; and the Mahomedan rulers established a tenure,

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called *Ghatwally* tenure, by which lands were granted to individuals, often of high rank, at a low rent, or without rent, on condition of their performing these duties, and protecting and preserving order in the neighbouring Districts.

Nothing could be more deplorable than the state of the Provinces under this system. Murder and rapine were common throughout the country; more than half the lands were waste and uncultivated; and neither the Ryots nor the *Zemindars* had any inducement to improve them, as any increase in their value had only the effect of increasing the Government assessment.

It was considered by the East India Company that the first step towards a better system of Government and the amelioration of the condition of their subjects would be to convert the *Zemindars* into landowners, and to fix a permanent annual *jumma*, or assessment to the Government, according to the existing value, so as to leave to the land-proprietors the benefit of all subsequent improvements.

Accordingly, they determined to make the assessment in the first instance for a period of ten years, with a view to its being ultimately made permanent.

In 1789, the original Rules and Orders for the Decennial Settlement of Behar were issued; the Settlement in the other Provinces being issued in subsequent years.

In 1791, by Regulation LXXII, an amended Code of Regulations relative to the Decennial Settlement of Bengal, Behar and Orissa, was promulgated.

By section 1 of that Regulation it was provided, that a new settlement of the land revenue should be concluded for a period of ten years.

By section 2, it was provided, that it should be at the same time notified to the landowners with whom the settlement might be concluded, that the assessment fixed by the Decennial Settlement would be continued after the expiration of the ten years, and remain unalterable for ever, provided such continuance should meet the approbation of the Court of Directors.

By section 31, it was ordered, that the allowances of the *Kazees* and *Canoongoes*, heretofore paid by the landholders, as well as any public pensions hitherto paid through the

landholders, be added to the amount of their *jumma*, and be in future paid by the Collectors on the part of Government.

The assessment was to be exclusive of all *La-khiraj* lands, whether exempt from *Khiraj* with or without authority.

The *Chakeran* lands, or lands held by public officers and private servants in lieu of wages, were not to be excluded, but were to be subject to assessment in common with the other lands in the *Zemindary*, the exemption which such lands had previously enjoyed being thus destroyed.

The landholders were declared responsible for the peace of their Districts as therefore, and were to act agreeably to such Regulations on this head as might be thereafter enacted.

The *jumma* was to be fixed by the Collectors on fair and equitable principles, with the reservation of the approbation of the Board of Revenue, to whom he was to report the grounds of his decision.

The Collectors, in fixing the *jumma*, were to adopt the following as a general rule:—that the average product of the land in common years be taken as the basis of the Settlement, and from this deductions be made, equal to the *Malikana* and *Kurcha*, leaving the remainder as the *jumma* of Government.

The *Malikana* is the allowance made to the *Zemindar* for his maintenance, and the disbursements and outgoings allowed to him against his receipts fall under the term "*Kurcha*."

At this period Raja Kadir Ali was the *Zemindar* of Khurruckpore. This *Zemindary* is situated in the Zillah of Bhagulpore, on the frontier of the Province of Behar, and forms a considerable principality including many Pergunnahs and, amongst others, the Pergunnah of Gorda, in which the lands in dispute lie. A very large quantity of lands within this District had been granted by the ancestors of the Raja on the *Ghatwally* tenure before described. In the *Teppa* of Dhumsaeen, a Subdivision of the Pergunnah of Gorda, no less than thirty-five villages were held at this time upon this tenure by *Ghatwals*, and, amongst others, the lands in question by an ancestor of the original defendant in these proceedings.

The extent and particulars of these vast estates, and the nature of the *Ghatwally* tenures, were well known to the Government of Bengal at the time when the settlement was made. Some years before, in consequence of disturbances

1843
Rajah Lokenauth
Roy Debeah

The Government of Bengal

much and taxes paid in the country among the time of Kasim Ali when the Government had found it necessary to make a military force, and having displaced the Dun Rajah and [illegible] had let the *Zemindary* under the charge and control of their own officers. Mr Vaughan Cleveland, who had the management of it up to the year 1781, about which time Kasim Ali the farmer having died was put into possession of the Dun.

It appears from evidence on the cause the report of the Collector of Bengapore of the 19th of November, 1813), that Mr Cleveland during the time that he was in charge [illegible] granted to more than 87,184 begahs of land in the [illegible] to extend the adjoining District [illegible] tenure in conformity with the orders of Government.

It appears from the evidence of Mr Sutherland's Report, dated the 8th of June 1814 that two grants before Mr Cleveland's time to the Collector reserved a payment [illegible] per begah, as a fair equivalent to the *Zemindar*, that [illegible] granted indiscriminately by Mr Cleveland [illegible] but that he afterwards resisted on [illegible] being made to the Government which he was [illegible] to the Government and that all grants [illegible] by the Collector of Khanckpore contained the same reservation.

[illegible] to be paid by Kasim Ali was to be fixed [illegible] Permanent Settlement. As might be expected [illegible] the magnitude of the estate, it appears [illegible] and [illegible] Lees village was [illegible] as a register the deductions and [illegible] out of the one and the particulars of the lands to be exempted from the assessment (for [illegible] lands, were executed, were the subject of [illegible] before the Collector of the District and the Board of Revenue at Fort William, [illegible] was [illegible] Rs. 4,49,8a 10½ p.

It is asserted [illegible], and denied, on this case has been [illegible] that the Ameeah lands formed part of the *Zemindary*. It appears [illegible] that they were recorded in, and [illegible] the Government. Had they been excluded,

the amount [illegible] Government, and might have been [illegible] necessary to prefer by [illegible] upon the [illegible] fact in the cause by the Supreme Court. Mr. Mytton in his judgment of the 17th of May, 1843.

1793
Rent free tenure in Bengal

Whether [illegible] lands were [illegible] of revenue to the *Zemindar* [illegible] that if it were important [illegible] has satisfied their Lordships that [illegible] from them by the *Zemindar* [illegible] he derived the benefit arising from the services of the *Ghatwals*, and enjoyed the valuable right of appointing the individuals, who, with the lands were to take upon themselves the duties of the office. It was not the object of the Settlement that [illegible] lands should be assessed to the extent which did not actually produce rent, and therefore [illegible] to increase the assets of that time. He found [illegible] probably more than half the lands in the country were waste and unproductive at this period, and one of the main objects of the Permanent Settlement was to bring them into cultivation.

These matters continued on to the year 1792 [illegible] *duars*, or public police officers appointed by the *Zemindar* had been found very inefficient and the Government had appointed officers of their own to assist in keeping order, who had concurrent jurisdiction with those named by the *Zemindar*. In the year 1792 the Government determined to suppress the *Duars* or passes established [illegible] the landholders, and to take to themselves the [illegible] preservation of peace and the apprehension of criminals by means of a police force of their own, to be established at convenient stations throughout the province. As the [illegible] were to be selected from the natives to whom lands were allowed for the maintenance of the force they were to be [illegible] and very reasonable that when [illegible] had been made by the Government, the [illegible] constituted, and the Government [illegible] resolved to resume the right of discontinuing them, or (when lands had been allowed for the purpose of resuming them.

To carry [illegible] Regulations [illegible] VIII and L of 1792 were issued

1793

Raja Tejanand Sing Bahadoor v. The Government of Bengal

The preamble of Regulation XLIX recites, in strong language, the former abuses practised, and the utter inefficiency and frequent oppression of the *Zemindars* employed by the landholders.

Section 1 provides that the police of the country in future to be exercised under the exclusive charge of the officers of the Government who may be specially appointed to that trust. The *zemindars* and farmers of land, who keep up establishments *from habit* and pretext of others, for the preservation of the peace, are accordingly required to discharge them and all landholders and farmers of land are prohibited from entertaining such establishments in future.

By section 2 landholders and farmers are no longer to be held responsible for robberies committed on lands respective estates. Provision is then made for the appointment of a police force in different stations throughout the provinces, each under the charge of a *Daroga* or superintendent, and the whole is stipulated to be exercised of the Magistrate.

It is clear that the police here spoken of is distinct from the *Zemindars* and village watchmen for these persons are by the 14th section declared subject to the orders of the *Daroga*, and by the 15th section are ordered to apprehend and send offenders to the *Darogh*, and afford every information to him.

By Regulation L of the same year, 1793, a tax is to be levied within the District of each police establishment, for defraying its expenses, and the 17th section, which is very important, is in these words, it is a circular addressed to the Magistrate of each District—"You will report whether the landholders of your District have been allowed any deductions on their *jumma*, or are in the receipt of any money allowances or hold any lands either free of, or at a reduced, revenue, for the purposes of keeping up *Chowkidars* or other police there and also your opinion whether the whole, or any, and what part of such deductions, allowances, or produce of such lands may with equity be brought to the public account, in consideration of the landholders being now prohibited from keeping up such establishment and Government having taken upon itself the charge of the police.

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Raja Lekhmund Roy Bahadoor
v.
The Government of Bengal

Nothing could be clearer than the [illegible] to, as [illegible] permitted by the Government [illegible], or at a reduced revenue, for the purpose [illegible] which the *Zemindar* has permitted other persons to hold free from rent, or at a reduced [illegible] lands which such persons had a right to hold [illegible] and that any lands which were on the first enhancement were to be reported to the Government by the Magistrate together with his opinion, whether it was consistent with equity that the whole or any part of the produce of such land should be brought to the public account; and further that the provision applied and continued in case of those which the *Zemindar* is no longer permitted to keep.

Though the Decennial Settlement had been made as to the several Provinces of Behar Bengal and Orissa under different Regulations, and although as to some of the estates the Settlement had not been effected so early as 1793, it was thought right on that year finally to establish its permanency, and for this purpose the celebrated Regulations of 1793 were published.

They were many in number and after declaring the Settlement, to be now permanent, re-enacted, with some modifications with respect to the Three Provinces all the provisions which had been previously made with respect to them separately.

The clause relating to the resumption of allowances which had been made to the *Zemindars* for police establishments, is in these words: "Regulation 1, section 8, clause 1. The owner of those *Zemindaries*, independent *Talookdaries*, and other actual proprietors of land which is declared fixed in the foregoing articles, is to be considered entirely accountable to and exclusive of, any allowances which have been made to them in the adjustment of their jumma for keeping up *Zemindaree* police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose, and the Governor-General in Council reserves to himself the option of resuming the whole or part of such allowances or produce of such lands according as he may think proper in consequence of his having ascertained the proper rate of land

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Nov. 4 & 5
Nobo Coomar and Kaly Kishore
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The Government of Bengal.

from the charge of keeping the peace and appointed officers on the part of Government to superintend the police of the country. The Governor-General in Council however, declares, that the allowances or produce of lands which may be resumed will be appropriated to no other purpose but that of defraying the expense of the police; and that instructions will be sent to the Collectors not to levy such allowances, or the produce of such lands, to the account of the proprietors of land, but to collect the amount from them separately."

Upon the meaning of this clause the question in this cause depends. It is obvious that it has reference to the Police Regulation of 1792, and to the allowances with respect to which an inquiry was directed to be made in that year. It is unnecessary, therefore here to repeat the observation already made as to their effect.

By Regulation XXIII of 1793 the same inquiries are directed to be made by the Collectors as had been ordered to be made by the Magistrates in 1792; but, as the language is not precisely the same, it may be as well to state the clause at length. It is section 37, and is in these words:—"The Collectors are to report all allowances that may have been made to the proprietors of land for keeping up police establishments, either by deductions from their rents, or by permitting them to appropriate the produce of lands for that purpose, or in any other mode, which may not have been already resumed, with their opinion how far the whole or any portion of such allowances can with equity be resumed in consequence of the proprietors of lands being exonerated from the charge of keeping the peace, as declared in Regulation XXII of 1793;" which Regulation had re-enacted the provisions of Regulation XLIX of 1792.

The same provision with respect to *Chackeran* and *Lo Khiraj* lands which had been contained in the Regulations of 1789 are repeated in those of 1793, namely, that the *Chackeran* lands should be included in the Settlement, and the *Lakhiraj* lands excluded from it.

Although both the *Lo Khiraj* lands and the *Tuncaldary* lands are reserved for further inquiry under these Regulations, there was obviously a great distinction between them with respect to the period at which the lessees relating to them ought to be made.

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Raja Jeswant Rao Bandekar
v.
The Government of Bengal.

The *Lakhiraj* lands were separate from the *Zemindary*, and were excepted out of the Settlement. The amount of the exemption claimed for them depended on the validity of the grant under which it was claimed. Very many of the grants were believed to be fraudulent, but each case was to depend upon its own circumstances. The investigation of such circumstances might occupy a long time, and a discovery of grounds of suspicion might take place at any period. As these lands were not to be included in the Settlement, no great inconvenience could arise from delay.

But with respect to the allowances for a police force made by the Government, whether in land or in money, the case was quite different. They were included in the Settlement and if any additional charge was to be thrown upon the landholder in respect of such allowances, it was necessary that it should be ascertained as part of the Settlement. No difficulty in ascertaining the fact could possibly exist. The assessment had been very recently made, and the officers who had made it must in every case, be perfectly aware whether any such allowance had or had not been made.

In pursuance of these Regulations Mr Dickenson the Collector of Bhagulpore, was required to report whether in the Settlement for Khurruckpore any such allowances had been made; and on the 20th of April, 1793, he made his report in the negative. His words are these (contained in a letter addressed to the President and Members of the Board of Revenue of Fort William, relating to this and other *Zemindaries*) — "In obedience to the 30th Article I have made the necessary inquiries, but do not find that any allowances, either by deduction from their *jumma*, permission to appropriate the produce of lands, or any other mode, have been granted to any *Zemindar* or *Talookdar* for keeping up a police establishment."

This inquiry took place before any permanent grant had been made of this *Zemindary* and with a view to [illegible] claim to resumption of lands [illegible] upon the footing of the report, [illegible] Government; and nearly two years afterwards, on the 26th of January, 1796, the Government [illegible] Raja, of the whole *Zemindary* of Khurr[illegible]

1855

Raja Lekanund Sing Bahadoor v. The Government of Bengal

lands in question, to hold to him in perpetuity at the *jumma* assessed in 1789-90 namely, Rs. 4,459 8s. 10½p.

It is said that Mr. Dickenson made this report under a mistake. A mistake of what? Not of facts, certainly. The existence and nature of these *Khoodkasht* tenures, the extent to which they prevailed in this District, and the mode in which they had been dealt with in making the assessment must from the circumstances which have been stated have been perfectly familiar both to the Collector and to the Board of Revenue.

But was he under a mistake of law? That he considered the *Khoodkasht* lands as not within the meaning of the clause in question is abundantly clear, and if he was mistaken as to the intentions of the Government who had framed it a mistake so deeply affecting their revenues, and involving to such a great extent of territory, must at once have excited the remarks and the remonstrance of the Revenue Board, but they make no objection to his view of the subject, and accordingly, the grant is made on the terms already stated. The grantee holds under it, and for more than forty years no attempt is made to disturb it.

It would seem to be very difficult under such circumstances, to permit any part of the lands so granted to be resumed on any allegation of mistake if there were reason to suppose that any mistake had been made.

Indeed, by Regulation II of 1819, the East India Company formally "renounce all claim on the part of Government to additional revenue from lands which were included within the limits of estates for which a Permanent Settlement has been concluded, at the period when such Settlement was so concluded, whether on the plea of error or fraud or any pretext whatever, saving, of course, such as expressly excluded from the operation of the Settlement."

But these Lordships are far from thinking that there was any mistake, either on the part of the Collector or of the Board of Revenue. At the information which their Lordships have obtained from the Records, they entertain a different conclusion.

In Mr. Grant's Analysis of the Finances of Bengal addressed to the Court of Directors on the 3rd June 1786, and printed in the Appendix to the Fifth Report of the Select Committee

1858

H. T. Prinsep and A. Ramsay

The Government of Bengal

...n the Affairs of the East India Company, p. 208 the Zemindary of Beerbhoom is stated to have been conferred by Jaffier Khan on an Afghan or Patan tribe, 'for the purpose of employing the frontiers to the west against the incursions of the barbarous Hordes of Marattas, by means of a warlike Mahomedan peasantry cantoned as a standing militia with suitable territorial allotments, under a principal landholder' and Mr Grant afterwards describes the tenure 'as in some respects corresponding with the ancient military fiefs of Europe, inasmuch as certain lands were held *khairaj*, or exempt from the payment of rent, and to be applied solely to the maintenance of troops.'

There is no doubt that the tenures here spoken of are *Ghatwálly* tenures, though they are not mentioned by that name.

Beerbhoom immediately adjoins Kharckpore, and in 1765 some *Ghatwály* lands were transferred from Beerbhoom to the District of Bhagulpore to which Kharckpore attached and in 1793 lands of the same description were transferred from Bhagulpore to Beerbhoom

In 1814 a report was made by the Collector of Bhagulpore to the Magistrate of Beerbhoom in answer to certain questions with respect to *Ghatwály* lands in his District. The Collector states, that the *Ghatwály* lands in his District are of four kinds First The lands actually retained by or granted by Mr Cleveland These he states to have been allotted in the environs of the forests at the foot of certain mountains which he names in various Pergunnahs and amongst them Pergunnah Kankjole and a few other villages of the Kharckpore estate to certain Ghatwals with whom he entered into engagements in the proportion of the number of men they undertook the said *Ghatwals* to attend to and guard the passes at the passes, and to patrol the parts of the country so that no mountaineers might be able to descend from the fastnesses of the mountains to commit robberies or to make an assault or to plunder moose
The second class the
attached to the Kharckpore estate
rate of rent for their lands

1833.

Nature of the rights of the Ghatwals in the Government of Bengal.

protect and guard the highways to watch the stations at the passes to prevent by stances being erected by the mountaineers thieves, and highwaymen. They hold their lands in virtue of sunnuds granted by the *Zemindar* of Khurruckpore, except some who have received theirs from the former authorities." The report then proceeds to state, "That when the *Zemindar*, or Government authority, wishes to appoint a *Ghatwar* to guard the frontiers of the villages, it is his duty to ascertain the produce of the villages, the quantity of *Ghatwally* lands therein, and after deducting a certain rate in the rate of the guards with the *Ghatwals*, in lieu of wages, to fix a certain rent to be paid by the *Ghatwals*."

After mentioning other description of *Ghatwally* lands, he states his opinion, that the *Ghatwals* have no right of inheritance or proprietary interest in their lands, but hold right of possession as long as they perform the terms and conditions of their sunnuds. The report then states, that at the time of the Decennial Settlement the *Ghatwals* were not treated as independent *Zemindars*, that no Settlement was made with them, but that they were included in the Settlement of the *Zemindar* of whom their lands were held.

In 1815 another report was made by the Collector of Bhaugulpore, in which it is stated that the *Ghatwals* pay a haus rent to the *Zemindar* of Khurruckpore, and continue under his control, direction, and subjection, and while the Raja is answerable to the Collector for the rents of the entire District of Khurruckpore.

With respect to the *Ghatwally* tenures in Beerbhoom, it is stated in a Regulation passed with respect to them in 1814 (Regulation XXIX of that year), that the class of persons, called *Ghatwals* in the District of Beerbhoom, from a peculiar tenure and that every ground exists to believe that according to the former usages and constitution of the country, this class of persons are entitled to hold their lands, generation after generation, as hereditary subject, nevertheless, to the payment of a fixed and established rent to the *Zemindar* of Beerbhoom and to the performance of certain duties for the maintenance of the public peace as a part of the police

This description is correct [illegible] to the District of Beerbhoom but in the case of *Hurro* v. *Juggut Surry*, which occurred in 1807 a question arose as to the nature of these tenures generally the point to be determined being, whether they were [illegible] at the death of a [illegible] or descended to his eldest son. One of the Judges states that these tenures are very common in the Northern territory for the protection of the [illegible]. Another of the Judges seems to consider them as [illegible] lands and the Court was of opinion, that the lands being held conditionally on the performance of certain official duties they were not liable on the death of the [illegible], but descended to the eldest son.

1808
Rajah Pertaumut Sing v. Baboo Buddun Sing
The Government of Bengal

Lands of this description could not properly be considered as lands of which the *Zemindars* had been gratuitously by the Government to appropriate the produce to the maintenance of *Peons*, or police establishments. They were held by a tenure created long before the East India Company acquired any dominion over the country, and though the nature and extent of the right of the [illegible] in the [illegible] villages may be doubtful, and probably differs in different Districts and in different instances, there cannot be a more ancient law or usage by which these lands were appropriated to reward the services of [illegible] [illegible] such, although they would induce the performance of [illegible] of police were quite as much in their origin of a military as a civil character, and would require the appointment of a very different class of persons from ordinary police officers.

We find accordingly that the office of [illegible] in the *Zemindary* was frequently held by persons of high rank.

Before the date of the Regulations, and in 1784, we have a letter from the Collector of Bhagulpore to the Hon. Kadir Ali, informing him that the Rance Surbessree who bore the title must have been a female of high rank had been dismissed from her office of [illegible] of Jumoor. Honoara which is situate in the Khurruckpore estates by order of the Governor General in Council, and intimating that "as the office is in your Highness's gift, Your Highness will, should you deem it necessary and proper appoint a person to the discharge of it

[illegible] 2nd Dow Rep. 170.

1856

Raja Lokenath and Ram Baksh Singh

The Secretary of State

of the said Pergunnahs to resume and enjoy the said [illegible] Should it be necessary for Government to assume and resume the [illegible] Chuttuk Khansamah shall be bound to assist in apprehending the [illegible] offenders, and to be answerable for the appearance of a police officer [illegible] which no servant under the Raja should ought have been allowed to [illegible] of the Magistrate with respect to a chuttuk under his orders.

Again, the other complaint by the resumption clause, were a class which the zemindar was in future prohibited from keeping. Was this the case of the *Chuttuks*? Why, we have a letter from the Collector of Bhagulpore to the Raja of Khurruckpore on the 1st of September 1808, in which he observes, "As the settlement of rent between the watchmen and yourself rests with you, so also does the dismissal and transfer of the *Chuttuks*, &c., as usual and customary on your estate, the Magistrate has no objection to the measure" (which the Raja had proposed to take) "nor is the Collector opposed to the step," and in the reports of the Collectors to which we have already referred, it is stated, that it is the province of the Raja to appoint and dismiss the *Chuttuks* attached to the Khurruckpore estates, that he usually, but not always, makes a report to the Government when he does so, "that the settlement rests with him, and he raises or depresses the rent."

The appointment of *Chuttuk* has been continued, with the assent of the Government, up to the present time.

Upon this review of the evidence, their Lordships are of opinion, that if any attempt had been made in 1796 to resume these lands under the Regulation now in question, such attempts must have failed, and that, therefore there can be no ground for the claim now set up by the Bengal Government.

It may be proper to notice the proceedings which have ended in the judgment against which the present appeal is brought.

It appears that on the 29th of November 1836, the Government in India ordered that if the *Chuttuckly* lands were of a nature to be resumed they be subjected to resumption

1858

Ra a Leonard Smyt Bahadoor

The Government of Bengal

The proceedings to be taken for the purpose of ascertaining and the Court or tribunal which is to decide the matter are of a special character

The Collector of the District or his Deputy enters on record a claim to assess the disputed lands notice is given to the owners, upon their answers, and upon evidence, the Collector who has made the claim, or one of his deputies, decides upon its validity and if either party is dissatisfied there is an appeal to a Special Commissioner appointed by the Government

On the 1st of May 1858, Mr Travers then Special Deputy Collector of the Districts of Bhagulpore and Monghyr entered the following claim on the part of the Government against Toofany Sing *defendant* who was in possession of the disputed lands in this case:—

"Claim to assess 745 beegas of [illegible] lands situate in *Ghat Jowdar* Tuppa Dhumsaon As it appears from an examination of the *Tuhseel* books furnished by the Magistrate of this District, for the year 1850 (B S) that the said lands have been appropriated rent free by the said defendant as belonging to the said *Ghatwalee* and as it is necessary under Regulation II of 1819, C L, and Regulation III of 1828 C L to enquire into the legality or otherwise of the lands granted as therefore, ordered, that this case be numbered and filed in the file of the Court, and that notice be served upon the defendant"

It does not very distinctly appear from the statement of the claim, upon what grounds it was intended to be resisted but we collect that it was thought that these lands were not resumable in the estate of Khurruckpore that they had been [illegible] and that as no Settlement had been made with them they were still the subject of settlement or assessment to Government

The matter then came upon some interlocutory proceedings before Mr Alexander the Officiating Special Deputy Collector of the Districts of Bhagulpore and Monghyr and on the 10th of November 1858, he passed an order in favour of the tenure — He consequently directed that the lands should be finally granted free of assessment to the defendant and his heirs and successors for ever, subject to the usual conditions, viz, of the [illegible] rendering such services as he has been, it is to be presumed, accustomed to perform, which, it is to be observed, have not undergone any settlement up to the present time, for the

1858.

Raja Leemood Mug Bahadoor v. The Government of Bengal

settlement was effected [illegible] which the said lands were set apart in 1784, F. E. and notwithstanding that 2 annas per begha used to be paid to the *Zemindar* for [illegible] yet, as that cannot be considered [illegible] but a simple fee in acknowledgment of the right of the *Zemindar*, the said lands are consequently of a nature to be resumed.' It was then ordered, "that the defendant produce any document in his possession invalidating the above-mentioned circumstances within a week, otherwise judgment would go in favour of Government without any plea or opposition being taken into consideration."

The Raja of Khanckpore was apparently supposed to have nothing to do with the question, he was not made a party to the proceedings, nor served with notice of them. But, on the 27th of November, 1855 he presented a petition, stating that he was the owner of the land, and that Puchun Sing had made a lease from him.

The original defendant put in his answer stating that he and his ancestors for several generations had held these lands at a rent of 2 annas per begha from the Raja of Khanckpore, and that lands, amounting thirty-six or forty bighas, made others subsequently added were held by the same tenure of the Raja.

A great deal of evidence was gone into, many witnesses were ordered on the report of which it distinctly appeared that these lands were part of the estate of Khanckpore, and had been included in the Settlement for that estate; and, accordingly, on the 9th of December, 1858, Mr. Alexander pronounced a decision founded on those proofs in which he declared that the lands were of the nature of *Lakhiraj* lands, that they were not of a nature to be resumed, and he ordered the claim of Government to be dismissed.

Like decrees were at the same time pronounced, by Mr. Alexander in the ten other suits.

Not long after these judgments were pronounced judgments to which no objection can be made except that they ought to have awarded costs of suit to those who had previously been made against them. Mr. Alexander, on minutely examining the papers, altered his opinion, and thought that although the lands might not be resumable on the grounds originally taken, they might be subject to assessment under Section 8 of Regulation I of 1793, and he applied for permission to review his judgment

1855.

Ram Lochun Roy Bahadoor

The Government of Bengal.

The Court, proceeding to hear the appeal, decided that it should come on for hearing on the 31st of December in the Court of appeal to the Special Commissioner for Burdwan, Nuddea and the three districts just mentioned, and also that the same Assessor should be invited to assist in the Settlement of the Khurruckpore estate.

Before the appeal was heard, the interest of Maha Raja Rohunut Ali Khan the original opponent of the Government, had been assigned to the father of the present appellant, and he was admitted a respondent to the appeal of the Government.

During the course of these proceedings, the same question had been raised by the Government with respect to other *lakhiraj* lands in other Pergunnahs of this *Zemindary*, and on the 20th of May 1848 Mr Travers to some of these suits, decided in conformity with Mr Alexander's decision and dismissed the claims of the Government, not, it seems, that these decisions were endorsed by the Special Commissioner on appeal.

Other suits, for other lands, of the same description, came before Mr Alexander, who decided them, not in conformity with his first determination, but according to the view which he had subsequently taken.

On the 31st of May 1851 the appeals in the present suit came before Mr Pratt, Special Commissioner, who reversed the decision of Mr Alexander stating as the ground of his judgment, that it was evident that the *lakhiraj* lands in dispute in this case, as well as in the other *lakhiraj* suits were distinct and separate from the Settlement made by the Government. He established therefore, the claims of the Government, and ordered that all the costs of the suit should be borne by the then respondents.

The concurrence of another Special Commissioner was necessary to give effect to this decision, and on the 27th of December 1852 the case came before Mr D'Oyly.

Mr D'Oyly differed from Mr Pratt and the case was therefore, remitted to Mr Moore, Special Commissioner for Calcutta and Moorshedabad.

That gentleman directed the papers to be sent to the Secretary of the Sudder Board, for the purpose of ascertaining

* See Ben Reg. III of 1825, sec. 4, cl 5

1877

Rani Lutchmee Kooer v. Rajah Pertaub Sing Bahadoor

The Secretary of State in Council of India v. Bhoop Singh

whether the Khurruckpore lands had been excepted from the Settlement of the Khurruckpore estates or not, and finding that they had not been so excepted, he recorded his opinion of Mr. D'Oyly and others that the appeal of the Government in this, and the other ten suits of the same nature, should be dismissed.

The Government was still dissatisfied, and on the 19th of September 1843, they applied for a review of the judgment.

The case came again on, on several occasions, before Mr. Moore, who directed many more enquiries, the result of which, in the opinion of their Lordships, was to confirm the decision at which he had already arrived. Mr. Moore, however considered that his former judgment was erroneous and on the 9th of July, 1844, he reversed it. On the 8th of September of the same year, the case came before Mr. Gordon, a Judge of the Sudder Court, vested with the powers of a Special Commissioner, under the orders of Government, who expressed his concurrence in that decision; and at last, on the 27th of June 1845 a final judgment in favour of the Government was pronounced by these gentlemen, resting their decision as we understand it on the ground that these lands were on resumption lands granted for peace establishments and were to be considered as provided for in clause 4, section 8, Regulation 1 of 1793.

From that decision the present appeal is brought to Her Majesty in Council, and it is scarcely necessary to say that their Lordships must humbly report to Her Majesty their opinion that the decision complained of ought to be reversed. They have already sufficiently explained the reasons for their opinion, namely, that these lands are not properly within the meaning of the clause relied on by the respondent, that they were a part of the *Zemindary* of Khurruckpore, and were included in the Settlement for that *Zemindary*, and covered by the *jumma* assessed upon it.

If any case should occur in which lands of *Ghatwally* tenure, though not, in their Lordships' opinion, properly falling within the meaning of the Regulation, have nevertheless been dealt with as such, and have not been included in the Settlement of 1793, such case will have to be decided upon its own circumstances and will not be governed by their Lordships' present decision.

1874

Secretary of State for India v. Government of Bengal

With respect to the costs of the proceedings which have taken place, their Lordships do not doubt that the Bengal Government, in bringing forward this claim, have acted under a sense of public duty; but it was an attempt to disturb, upon insufficient grounds, a Settlement which subsisted without dispute for above forty years, under a title from the right to disturb it, if it exists at all, existed with as much force as when the proceedings were instituted. The claim has been permitted to after several decisions against the Government by their own officers acting as Judges, the power to their favour has been finally obtained upon grounds different from those on which it was originally sought, and the appellant has been exposed to a long and most expensive litigation. Under these circumstances, their Lordships think that they should do but imperfect justice, if they did not humbly recommend to Her Majesty that the respondent should be ordered to repay to the appellant all the costs which they have received from him under orders of the Judges below, and should also be ordered to pay to him the costs which he has himself incurred in these proceedings, including the costs of the present appeal.

JOYKISHEN MOOKERJEE
v.
THE COLLECTOR OF EAST BURDWAN.

[*Reported as* 10 *Moo. I. A.*, *Rep.* 1 *W. R.*, *P. C.*, 20; 2 *Sar. P. C. J.* 34.]

First Day, May 5

The consideration of the appeal was resumed; judgment was now delivered by

THE RIGHT HON. LORD KINGSDOWN.—The question in this case relates to a small quantity of land, consisting of nineteen beeghas and some cottahs, in the *Talook* of Gobindapur. This *Talook* originally formed part of the great *Zemindary* of Burdwan, and previously to its purchase by the appellant it had been granted in *Putnee* by one of the Rajahs of Burdwan. In the year 1852 it was put up to sale by the Collector of the Zillah of East Burdwan under the provisions of Beng. Reg. VIII of 1819, in order to realize the amount of arrears of rent due from the then *Talookdar*. The appellant became the purchaser, and entered into the receipt of the rents and profits of the *Talook*, and it must be assumed that as *Talookdar*, he became entitled to the same rights in the subject-matter of the suit which were enjoyed by the *Zemindar*.

At this time the lands now in dispute were in the possession of a person named Ahmed Bokh, who paid no rent for them either to the Government or to the *Talookdar*, but, instead of rent, performed certain services. What was the nature of those services is one of matters now in question. Another is, what is the character of the lands thus held by these services, are they legally appropriated for the performance of these services, or are they lands which are the free and absolute property of the *Talookdar* and which he is at liberty to resume and dispose of as he may think fit, either dispensing altogether with the services or providing from other sources for the performance of

Present.—Members of the Judicial Committee: The Right Hon. Lord Kingsdown, the Right Hon. the Lord Justice Knight Bruce, and the Right Hon. the Lord Justice Turner.

Assessors.—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

these services if he be under any obligation to [illegible] their performance?

1884 [illegible]
The Collector of East Burdwan

On the [illegible]th of January 18[illegible] the [illegible] suit was filed and the Collector of East Burdwan as representing the [illegible] was made a defendant. The plaintiff stated that the lands in question were part of the [illegible], that the lands were what are called "*[illegible]*" or "*[illegible]*" held for the performance of services personal to the *Zemindar*, and for the protection of his property; that Ahmed Buksh had ceased to perform any *Zemindary* services, and that the plaintiff had appointed another person to perform such services, and was entitled to resume possession of the lands.

On the [illegible]th of January, 18[illegible], the Collector of East Burdwan filed his answer, and he thereby insisted "that the lands in question was not [illegible] service land for taking care of the [illegible] or *Zemindar's* property, but [illegible] land for the performance of [illegible] or *[illegible]* duties; that [illegible] being *[illegible]* [illegible] the *Zemindar* has no power to interfere with them, [illegible] [illegible] [illegible] of their various duties."

The main issue raised between the parties, [illegible], was as to the nature of the tenure on which the [illegible] was held; the contention on the part of the appellant being that they were of one description and subject to the performance of [illegible] service, and the contention of the [illegible] that they were of another description and subject to the performance of no services to the *Zemindar*. Shortly before the [illegible] put in his answer, the *[illegible]* Court of East Burdwan had issued an order "that a *[illegible]* be sent to all the *[illegible]* of the jurisdiction, that the *Chowkeedars* under them [illegible] be instructed not to attend to *Zemindary* duties."

It appears that the *Zemindars* were [illegible], previous to the British possession of [illegible], as well [illegible] defend the Territory against foreign enemies, as with the [illegible] tion of law and the [illegible] d[illegible] that for the [illegible] not only [illegible] [illegible] but also a large force of *Tannahdars*, or a general Police [illegible] other officers in great numbers, under the name of [illegible]

1854
Jagadeb Narayan v. The Collector of East Burdwan

Pykes and other descriptions as well for the maintenance of order in particular villages and districts as for the protection of the property of the *Zemindar*, the collection of his revenue, and other services personal to the *Zemindar*.

All these different officers were at that time the servants of the *Zemindar*, appointed by him and removable by him, and they were remunerated in many cases by the enjoyment of land rent free or at a low rent in consideration of their services.

The lands so enjoyed were called *Chakeran* or service lands. These lands were of great extent in Bengal at the time of the Decennial Settlement, and the effect of that Settlement was to divide them into two classes:—

First. *Tuzmuhi* lands, which, by Ben. Reg. I of 1793, sec. 8, cl. 4, were made resumable by the Government, the Government taking upon itself the maintenance of the general Police force and relieving the *Zemindar* from that expense.

Second. All other *Chakeran* lands which, by Ben. Reg. VIII of 1793, sec. 4, were whether held by public officers or private servants in lieu of wages to be assessed to the *Malguzary* lands and so held responsible for the public revenue assessed on the *Zemindary* independent *Talooks* or other estates, in which they were included in common with all other *Malguzary* lands therein.

It is clear upon the evidence, and in fact was not disputed at the Bar, that the lands in question are *Chakeran* lands of the second class, and it follows that, if resumable at all, they are resumable by the appellant; and secondly, that if the services on which they are held are Police services at all, they are the services of *Chowkidars* or village watchmen.

The *Zemindar* had an interest in the performance of the duties of the village watchmen, inasmuch as they protected his property; but the whole also had a great interest in their maintenance and in the peace and good order which they were employed to preserve; and the Government, as representing the public, reserved therefore a strict control over them.

Accordingly various Regulations were passed for the purpose of enabling the Government to effect this object. Registers were required to be kept of the different persons filling these offices in each *Zemindary*, with a statement of the

1914.
Joykissen Mookerjee
v.
The Collector of East Burdwan.

funds allotted for their support. The officers themselves were made subject to the orders of the *Darogah*, or Superintendent of the Police of the District. The *Zemindar* was required to remove them on complaint of their misconduct by the *Darogah* and, finally, they were made removable by the Magistrate on sufficient cause. But we can find nothing in these Regulations which takes from the *Zemindar* the right of nomination of these officers or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of exacting from the *Chowkidar* such services as he was bound by law or usage to render to the *Zemindar*. It might well happen that either by long usage or by the original contract, when the lands were granted the village watchman might become subordinate to his Police duties to the performance of other services personal to the *Zemindar*, as the collection of his revenue and the like. Indeed, the rules laid down for the Decennial Settlement appear to recognize the interests both of the *Zemindars* and the public in lands of this description. They were not to be included in the *Mouzewary* lands for the purpose of exempting the *jummas* from the *Zemindar's* share of the full benefit of them; but they were to be included in the *Mouzewary* lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to their interests would rest.

Such being the open on the general law [illegible] at the facts of this particular case. It is found by the *Civil* Judge[1] that the duties performed by the persons in possession of these lands, both before and since the Decennial Settlement have been partly Police and partly *Zemindary* as follows:— *Zemindary*. First (personal to the *Zemindar*). To escort or enforce collection of rents; to guard Mofussil treasuries and perhaps to escort Mofussil treasures. Second (common to the village community). To keep watch at night, and to watch the harvests. Police. To maintain the peace; to report offenders under the orders of the *Zemindar*; to report criminal

[1] 10 Mon. L. A., p. 29.

1914.

Jyoti Nath Mookerjee v. The Collector of East Burdwan.

occurrences to convey police monies to the Sudder Treasury (this duty has ceased since the Decennial Settlement), to serve as guides to travellers. The Judge adds:—"I was told that it is customary and is my certain knowledge that most of these duties are at this time performed by the village watchmen in Burdwan."

From these findings their Lordships see no reason to dissent.

But it may well be that although these lands have been held by the predecessors of the Respondent, Ahmed Baksh and were held by him as *Chowkidari*, liability to perform services to the police as well as to the *Zemindar* is not that there has been no legal appropriation of the land for that purpose, and that the appellant may be entitled to recover the land though he may be under an obligation to provide for the performance of such services as a *Zemindar* is able to perform for the police.

The evidence appears to stand thus:—

At the time of the Decennial Settlement, though these lands were excluded in the *Zemindari* their annual value does not seem to have been taken into account in fixing the *jumma*. This is consistent at least with the hypothesis that they were then appropriated to the payment of some officers whom it would be necessary for the *Zemindar*, either for his own or for the public interest, to maintain. We find that in 1813, the particular lands in question were in the *Tuppa* held by Sreekissen, who is now held as *Tuppadar*, and they appear ever since to have been held by persons succeeding him in the same character. They were not held as *Towzeehary* lands in the strict sense of the expression—lands of that description had already been resumed by the Government—but as *Chowkidary* lands—lands appropriated to the maintenance of an officer who performed, and was liable to perform, duties as a village watchman. We think that these circumstances are sufficient to warrant the inference that the lands in question were at the time of the Decennial Settlement appropriated, and still are liable, to the maintenance of such an officer and that the *Zemindar* has no right to take possession of them for his own purposes, and hold them discharged of the obligation to which they are subject.

On the other hand it is established by the evidence that the *Chowkidars* in this district have always been accustomed to perform services personally to the *Zemindar* as well as to the

1884

Jakhotan Mankor
v.
The Collector of East Nimar.

Police Thanadar etc. stated to be the fact by Mr Skipwith, the officiating Collector, in 1887 and by the Judge of the Allahabad Court in the present case, and it is admitted by the Government We think therefore that the decree of the Revenue Court in December, 1885, forbidding the performance of Zamindary services by the Kamdhar was without any warrant in law

Cases of this description must as it seems to us, depend mainly, if not wholly, for their decision upon the question, what was the tenure on which the lands at the time of the Decennial Settlement and how they were dealt with in that settlement

In this case, the result of our inquiry is that both parties have erred in more than one way or other But one error has contended that the holder of these lands is liable to the performance of more than Zamindary duties, the other that he is liable to the performance of none but Police duties

Under these circumstances, we have considerable difficulty as to the course which we ought to take If we were the affirmance of the judgment, we may seem to countenance the opinion that the Government has no right to any portion of these lands save to appoint a person to perform the Zamindary services and the decision of this case to the Police and the Revenue and this is very far from being our opinion

On the other hand we think that we cannot order the reversal of the judgment, having regard to the form of the pleadings without sanctioning the position assumed by the appellant that these are free lands liable only to the performance of any but personal services to be appointed and from this opinion also we dissent.

The state of the pleadings prevents us from reaching the real merits of the case It is not for us to say how these merits may best be reached, It may be that the appellant having appointed a fit person to discharge the duties of village watchman, and to perform the duties personal to himself, is entitled to recover the land for the purpose of its being held by the person so appointed, or it may be that the person so appointed may himself be entitled to recover the land On these points we give no opinion But on the evidence, as regards to the appellant being plaintiff in the suit, and having failed to

1864

Jorbuhen Mookerjee v. The Collector of East Burdwan.

make out the case which he set up we think that we shall best discharge our duty by humbly advising Her Majesty to affirm the judgment complained of, but without giving any costs and to declare that the lands in question are to be considered as appropriated to the maintenance of a *Chowkeedar* or village watchman in this *Pergunnah* and that the right of appointing such officer belongs to the *Zemindar* and that no holder is liable to the performance of such services to the *Zemindar* as, by usage in the *Zemindary* of Burdwan *Chowkeedars* have been accustomed to render to the *Zemindar*, and to declare that the affirmance of the judgment is to be without prejudice to any of such other right which the appellant may think fit to institute in respect to the matters in dispute in this cause.

LOPEZ

v.

MUDDUN MOHUN THAKOOR *

[Reported 9 I. A. 244, 257; 5 B. L. R., 521 (P. C.); 14 W. R. (P. C.), 11; 9 P. C. J. 594.]

1880
July 14

Without calling for a reply their Lordships' judgment was pronounced by

THE RIGHT HON. SIR BARNES PEACOCK.—The plaintiff in this case, Mr. Lopez, was the proprietor of a very considerable estate, called Mouzah Sookchur, in the district of Dinagepore. By the year 1810, by reason of the gradual encroachment of that river, it was wholly submerged, and was what is called in the phraseology used in this class of cases a lost or 'devastated' tract, the surface and the cultivation of which was wholly washed away. After the lapse of some years, a portion of the land was recovered and re-encroachment with alluvial deposit, and the water has ultimately receded north, and having been for some time in a state fit for the purposes of only temporary cultivation by hand sowing, has become dry land, and capable of being cultivated in the usual manner for the benefit of the owner. This was my property. The Queen, whom we have served, has again wrested it, and I claim my property which, having been buried and extinguished, has again reappeared.'

The rule of the English law applicable to this case, is thus expressed in a work of great authority (Hale, de Jure Maris, p. 15):—'If an island arise in the sea, or a new island arise in a river of the sea, how small soever it be at first, yet these be reasonable marks to ascertain the notoriety of it; though the marks be defaced, yet if by certainty and extent of quantity and bounding upon the bounds the same can be known or else by ancient records regularly kept, it shall not lose his property.' 'If the mark remains, continuance to the extent can reasonably be certain, the case is clear.' And in another place (p. 22) he says:—'But if the land left again by the retiring

* Present:—The Right Hon. Sir James William Colvile, the Right Hon. Sir Barnes Peacock, and the Right Hon. the Lord Justice James.

Assessor:—The Right Hon. Sir Lawrence Peel.

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v.
Muddun Mohun Thakoor

recess of the sea, the owner may have his land as before, if he can make out where and what it was. If he cannot see his property of the sea, although it for a time becomes part of the sea, and within the Admiral's jurisdiction while it so continues.'

This principle is one not merely of English law, but a principle peculiar to no system of Municipal law, but it is a principle founded in universal law and justice; that is to say, that wherever any land whatever it is, whatever may be the accident to which it has been exposed whether it be a wasteland which is covered by lava or mud from a volcano, or is laid covered by the sea or by a river, the ground, the site, the property, remains in the original owner.

'There is, however, another principle recognized in the English law, derived from the Roman law, which is this: That where there is no separation of land from the sea or river by gradual, slow and imperceptible means, but from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch or a foot or a yard belongs, the accretion by all means is held to belong to the owner of the adjoining land. *Rex v. Lord Yarborough*.[1] And the converse of that rule was in the year 1834 held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that where the owners of the river gained from the land to the water, as the owner of the land had on the former case gained from the Sea. *Jones The Hundred v. Selby Harmer*.[2] To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property by embankments, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined.

The principle of law so far as it relates to accretion, has, to some extent been made part of the positive written law of India, and rests on the operation of such positive written law that the defendants' case is based. This law is to be found in the Regulation XI of 1825, a Regulation for declaring the rules to be observed in the determining of claims to lands gained by alluvion, or by the dereliction of a river or the sea. There is a

[1] 2 Bligh, N. S., 147. [2] 2 Mee & Wel., 237.

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v.
Maldeo Mohun
Thakoor

rental is that Regulation, as the disputes which had arisen with regard to such claims and the necessity of having some definite rule laid down with regard to several matters only one of which is material or relevant to the present case and that is the case provided for by the fifth section of the Regulation By cl 1 of that section it is provided that "when land may be gained by gradual accession whether from the recess of a river or of the sea it shall be considered as an accession to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from the Government or from any superior proprietor or landholder" And the defendants' contention is that the plaintiff's land having been wholly submerged, so as to make it not the land situate between the river boundary the subsequent recession of the river has caused a gradual accession to their land and an increase by annexation to their estate, notwithstanding that the land has been reformed on the ascertainable and ascertained site of the plaintiff's *mourah*.

It is to be observed however, that that clause refers simply to cases of gain of property by means of gradual accession. There are no words to apply the confiscation or destruction of any private person's property whatever If a Regulation is to be construed as taking away one man's property that intention to take away ought to be expressed in very clear words, or be made out by very plain and necessary implication The plaintiff here owned the land the property It was his property before it was covered by the flood It remained his property after it was submerged by the floods There was nothing in that state of things that took it from him and gave it to the Government When it emerged there was nothing that took it from me and gave it to any other person And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment by alluvion, or by what otherwise may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another

In truth, when the whole words are looked at and more of that clause, but of the whole Regulation it is to see what at what the then Legislative authority was taking was the gain which an individual proprietor might make in this way

1870.

Lopes

Maddan Mohun Thakur

from that which was part of the public territory the public domain not usable in the ordinary sense that is to say, the sea belonging to the State, a public river belonging to the State this was a gift to an individual some estate lay upon the river or lay upon the sea a gift to him of that which, by accretion, became valuable and available of that which, was in a state of nature neither valuable nor usable.

And on the very words of the section itself, if the ownership of the submerged site remained as it was until there seems nothing to take it away. It is difficult to see why a deposit of alluvium brought upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation marginally to the river frontage of the adjoining property.

If we had then to consider the question for the first time, we should have come to the conclusion that the 4th section did not govern the case and that the question would have to be determined by the general principles of equity to which all cases not within terms provided for are referred by the 5th section. Those principles would not give the possessor's property to the defendant. But the question is not raised for the first time. The very point came for consideration in India before a Court comprising Sir Barnes Peacock, Mr Justice Buxley and Mr Justice Kemp, and after full consideration it was decided that lands washed away and afterwards reformed on an old site, which could be clearly recognized, did not lose ground within the meaning of section 4 Regulation XI of 1825, etc., they do not become the property of the adjoining owner, but remain the property of the original owner.

And the same point arose in a case in the Court of *Mussumat Imam Bandi v. Hurgovind Ghose*[1]. It was there said "The whole of the District adjoining the land in dispute as well as that land itself, is flat and very liable to be covered or washed away by the waters of the Ganges which river frequently changes its channel. The land in dispute was inundated about the year 1787 it remained covered with water till about 1801, and then became partly dry, until, in the year 1811, it was again inundated. After this period it once again re-appeared

[1] Mon. I. A., 809; 17 C. L. J. 371

above the surface of the water and by reason of [illegible] like what has occurred in this case.

In that case it was held that [illegible] to which [illegible] Whoever was the owner [illegible] with water, and after it became dry."

The authority [illegible] the present case.

In a subsequent case [illegible] Thakur Lalji Maharaj [illegible] from [illegible] to which [illegible] of the [illegible] case [illegible] the [illegible] compel [illegible] and the law knows no difference [illegible]

These [illegible] have [illegible] under the [illegible] of the State and [illegible] and annexation.

But [illegible] the proper [illegible] necessity of any [illegible] which has been [illegible] has also taken the most effectual means in his

(1863) 2 W. R., 51

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power (having the description and measurement of the submerged mouzah recorded and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him. Their Lordships are therefore, of opinion that the property now being capable of identification by means of that *fanaud* and therefore the property having been the property of the plaintiff when it was submerged, never having been abandoned or deserted having now emerged from the Ganges, is still his property, and they will therefore recommend to Her Majesty to reverse the decrees of the Court from which the appeal has come, to affirm the decision of the Principal *Sudder Ameen* and that the costs of the litigation both below and here should be given to the appellant the plaintiff

HURRYHUR MOOKHOPADHYA

v.

MADHUB CHUNDER BABOO

NOBOKISHTO MOOKERJEE

v.

KOYLASHCHANDRO BHUTTACHARJEE

[Appeals from the High Court at Fort William in Bengal.]

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July 10

The consideration of the appeals having been reserved, their Lordships' Judgment in both cases was delivered by

Sir Robert Lush.—These appeals and that of *Hurryhur Mookhopadhya* v. *Madhub Chunder Baboo* were strongly argued at the bar before this Committee. The principal question involved is common to both; but each case has a distinct point peculiar to it. It was also raised that their Lordships would deal with them separately. They propose to take first the appeal of Nobokisto, though the last argued, because that appeal contains a judgment pronounced on the 27th of March, 1869, in the Lower Court, No. 208 of 1868,[1] wherein the High Court stated fully the grounds upon which the ruling, unperverted in both these appeals, is founded.

This suit was instituted by the appellant as a *lis protocollo*. Its object was to obtain a declaration that certain lands which the respondents claimed to hold as *Lakhiraj* lands were held by them under an invalid title; that they were the *ryot* lands of the appellant liable as such to pay rent to him, and to have them assessed accordingly. The suit was originally brought before the Collector, but under the provisions of an Act of the Bengal Council, No. VII. of 1862 was afterwards transferred to the Principal Sudder Court of Zillah Hooghly.

Present:—Members of the Judicial Committee:—The Right Hon. Sir James Wilde, Knight, the Right Hon. Sir Montague Smith, and the Right Hon. the Lord Justice Mellish.

Assessor:—The Right Hon. Sir Lawrence Peel.

Solicitor for the Appellants:—Mr. W. R. Sells.

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Chevalier
Moss and Co.
v.
Master, Chamber
Decree.

The point expressly stated was that the suit was brought under the 1st clause of section 11 of Regulation II of 1820. Their Lordships were not called upon for particular explanations of that enactment. It was material to observe that a suit brought under it by a farmer or one to whom the farmer's rights have been transferred throws upon the latter the burden of proving the nature and not merely the fact of the title which was intended to be thrown upon the landlord (the defendant) whom the plaintiff who disputes the rights of the tenure might compel to produce the grant or other document upon which such title rested. The issue proved in this case, which the defendant could require on the first existence from the plaintiff was that the lands in question were within the limit of his zemindary or other tenure as the case might be. This issue the zemindar established by the proof of receipt and successfully threw upon the plaintiff the burden of showing that the rent of the land, the assessment of which was disputed, was whether it was the respondent's valid rent free or not liable to be taxed by them. The proof on this issue being cast on them

The Principal Sudder Ameen of the Court of Patna rejected the claim of the appellants and the Patna Commissioner upon appeal affirmed that decree. It appeared that the Bengalis and Cuttabs had proved by various documents, that they had held at fixed rents the lands from long before the 1st of December 1790, and that consequently, the claim to assess them was barred by limitation. The resolution being "that collusion be left out of the assessment till parties appeared against the decree of the Zillah Judge who, on the 31st of June 1865 reversed the decree of the Principal Sudder Ameen so far as it related to the Bengalis and Cuttabs, but reversed it as to the rest of the land making as to that a decree in favour of the appellant's claim. The grounds of his decision were that the documents produced by the respondents were not satisfactory and, therefore, that they had failed to prove either a valid title to hold the land rent free or that the land, having been held rent free from a period commencing before the 1st of December, 1790, the appellant's right to assess them was barred by limitation.

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Butterbur Mukherjee v. Madhu Chander Bakshi.

The respondent then preferred a special appeal to the High Court. Of the grounds set forth in the appeal memorandum it is necessary to notice only the third and the fourth. The third was that the suit being brought [illegible] was not barred by section 10 Bengal Regulation II of 1805 as it was contended by the Collector. The fourth, that the Collector could not have cognizance thereof upon the defendant's plea. On the 11th of April 1870 the High Court remanded the suit with the following observations, being on the same allegations as the Court of First Instance stating only that the suit having been misplaced, those cases must go back to the first Court with reference to the principles laid down in case No. 905 of 1864.[1]

Before considering the grounds of the second motion the principal question to be considered is whether it would be necessary to remand the case of this particular case. The appellant went again before the Privy Council [illegible] amending his plaint by the addition of [illegible] the striking out all reference to the Bengal Act [illegible] and praying instead for the resumption of the [illegible] after the 1st of December 1869 was [illegible] being within the 10th section of Regulation XIX of 1793. The Privy Council [illegible] the question [illegible] was [illegible] being whether the land in dispute was [illegible] and whether at the [illegible] it had been [illegible] free and on the 19th of September 1870 [illegible] the suit upon the ground that the plaintiff (appellant) had produced no [illegible] and that [illegible] failed to support the burden of proof which [illegible] upon him. The appellant [illegible] August 1871 obtained from the High Court [illegible] to appeal to Her Majesty in Council on the ground that the suit, though the subject-matter of it was far below the appealable value was one of a large class [illegible] and similar remands had been made. That [illegible] whether that leave to appeal was properly granted, and that the object of the appeal or at least its principal object was to test the correctness of the principle on which remands in this and similar cases have been ordered, and the burden of proof to some extent cast on the plaintiff in suits of this nature.

[1] 2 W. R., 235

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Hurrychur Mookhopadhya v. Madub Chunder Bala

In order to do this it is necessary shortly to review the law relating to [illegible] tenures within the Provinces comprised in the Perpetual Settlement and some recent decisions of the High Court of Calcutta concerning it.

The foundation of that law is well known to be Regulation XIX of [illegible]. That Regulation after declaring in the strongest terms the power [illegible], and the right of the ruling power to a [illegible] of [illegible] every bargah after the [illegible] to be exceptional and in contravention of that right, that many of the existing tenures of that [illegible] were created [illegible] and that the [illegible] assessed upon the estates of ordinal rate after that Settlement was to be considered as exclusive and a [illegible] of all [illegible] such should be exempted from the Abwab or [illegible] revenue with or without the authority [illegible] to [illegible] with the [illegible] tenures. It divided them into two classes, those resulting by grants made previous to the 12th of August, 1765, the date of the grant of the Diwanny to the East India Company, and those created by grants made between that date and the 1st of December 1790. The former by the second section were subject to certain conditions, declared to be void. The latter with certain exceptions and subject to [illegible] were declared to be resumable and subject to future assessment. The Regulation then went on to subdivide the invalid and resumable tenures into two classes — those which comprised lands not exceeding 100 bargahs and those which comprised lands in excess of that quantity. The resume which might thereafter be assessed on the former was declared to belong to the [illegible] while those exceeding the limit were [illegible]. The resume which might thereafter be assessed [illegible] when the latter case was declared to belong to the Government. And thus the power of bringing a resumption suit to impeach a [illegible] tenure existing at the date of the Decennial Settlement and to have assessed or rent assessed thereon came to belong to the Government, or to private proprietors according to the quantity of land comprised in such tenure. Having thus dealt with all the

[illegible] Regulation [illegible]
to legislate against [illegible]
[illegible] the Decennial Settlement [illegible] free lands.
[illegible]

[illegible]
revenue [illegible] that may
have been [illegible] December [illegible] that may be
hereafter made [illegible] of the
Governor General [illegible]
[illegible] shall [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
not any estate [illegible]
[illegible] of the proprietor [illegible]
Officer of Government appointed to make the collections
from any estate or [illegible] is authorized and
[illegible] at the [illegible]
of the [illegible] the [illegible]
[illegible] and [illegible]
[illegible]
[illegible]
subsequent notice of the dispossession or [illegible] to any
Officer of Government [illegible]
dependent *Taluqdar* be liable to [illegible]
on account of [illegible]
during the term of the engagement [illegible]
for the payment of the revenue of such [illegible] or *Taluq* when
the grant may be so resumed and annulled. The managers
of the estates of disqualified proprietors, and of [illegible]
estates are authorized [illegible]
the proprietors [illegible]

It is [illegible] relates [illegible]
which on the 1st of December [illegible]
lands, that it treats the grant [illegible]
such lands [illegible] but as absolutely void; that [illegible]
[illegible]
[illegible] to [illegible]
that in length [illegible]

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Hanmer v. Wadsworth

Market Overt—Sales

grant. It further empowers an heir-at-law to die possessed of lands to the exclusion of his having become by the operation of the Statute of Limitations [illegible] for the recovery of possession of [illegible] heirs or those claiming through them.

The enactments provisions for computing the Limitation of Actions, were contained in several other Statutes, and in particular in the Statute 11 of 1833 which has been already mentioned. And in pursuance of those enactments, every action to recover land must be brought by means of legal proceedings rather than in the summary manner authorized by that statute. An important distinction was, however, established between cases where the owner of land was entitled to enforce a claim to it by entry only and those where he was entitled to recover it by action. In the former case the right of entry was barred at the expiration of twenty years from the time when the right to make it first accrued. Whatever doubts may at one time have existed, it became settled after the decision of the Court of Exchequer in *Doe d. Jukes v. Hawkins* [illegible] that a reversioner or remainderman was entitled to make an entry on the land at any time within twenty years from the time when the tenant in possession ceased to hold the land under the lease by virtue of which he had previously held it. In connection with that part of the Statute of Limitations [illegible] which provided that no claim should be made by any person or any person claiming through him to recover any land or rent but within twenty years next after the time when the right to make such entry or distress or to bring such action first accrued to the person making or bringing the same, it became a question how to construe the provision that the claim of a tenant in tail under this section was subject to the limitation. Now the tenant in tail has power to bar the estates of the remainder-men and reversioners who claim through him, and the question arose whether the right to recover such lands and rents was taken away from those persons who claimed through their ancestor, or whether they were entitled to enforce their claims at any time within twenty years after the death of the tenant in tail. The result was that

* 3 Bing. N. C. 962.

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Harrybar Mookerjee v Nistarini Dabee

the stringent provisions of Regulation II of 1819 and of the other Regulations on the same were not complied with. The appeal was heard ex parte. The question was first upon the defendant's plea of prescription. In the plaintiff's statement, that the land was settled in favour of him by the Act of December 1790. If he established that he owned the estate, it was immaterial whether his account of the land was available or not. He said unless the land of Bhagwan in his possession at a fair assessment rate, being barred by limitation.

So much the law and practice of the Act X of 1859, was passed. The first section of that Act enacted so much of the 14th section of Regulation XIX of 1793 as authorized the landowner summarily to dispossess the grantee of a rent-free tenure on proving that every landowner who should desire to assess any such land or to increase the grantee, should take proceedings before the Collector which were to be dealt with as a suit under that Act, and a period was prescribed within which such suits were to be brought.

Between the passing of this Act and the beginning of the year 1865 the Courts of Bengal seem to have been somewhat puzzled over several questions touching the proper mode of enforcing the claims of Zamindars and other landowners, under the 14th section of Regulation XIX of 1793 and some, at least, of such questions were mainly referable to a judgment given by a Full Bench consisting of seven Judges of the High Court on the appeal of Nobokrishna Ghose v. Woomesh Chunder Dutt. The case which was considered Nov. 1864, was decided on the 25th of January, 1865. The Judges were unable to agree, each delivering a separate judgment, in which the law on the subject was elaborately discussed. But the following was the final judgment of the Court. All the Judges held, that before the passing of Regulation II of 1819 the Civil Courts under their ordinary jurisdiction were competent to entertain regular suits by Zamindars for the declaration of their rights to resume revenue illegally alienated subsequent to 1790, and for possession of the land held rent-free under grants or title which at their origin subsequently to the 1st

[1] 2 W. R., 91; B. L. R. Sup. Vol., 169. See also Peeari Mookerjee v. Rajkrishna Mookerjee, B. L. R., Sup. Vol., 167.

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Bur ekur Mushkuradhara
Madhu Chandra Dalai

December in that year. Four of the Judges against three held that such suits were unaffected by the passing of Regulation II of 1871, section 30, of which the proper operation was restricted to suits for the resumption of *Lakhiraj*, existing prior to the 1st of December 1790. And hence the Judges against three held that the jurisdiction of the ordinary Civil Courts to try the suit was not taken away or affected by the 16th section of Act X of 1859.

'The ground of these rulings is that which is most material to the decision of the present appeal, the necessary consequence of it being that a suit to enhance a holding under the 10th section of Regulation XIX of 1793 is brought under the 8th section of Regulation II of 1871 in order to get the benefit of the procedure there prescribed as exclusively framed.

'The same case came again before a Full Bench of seven Judges somewhat differently composed on the 22nd of February, 1875. They unanimously held that they were bound by the decision of the 21st of January 1874 so far as it went. But they further decided, that the question which notwithstanding the 8th section of Act No. X of 1859 might still be brought to assess or resume rental *Lakhiraj*, created since the 1st of December 1790 was not subject to limitation, and further, that in every fresh suit it lay upon the plaintiff to prove that the case was one falling within the 11th section of Reg. XIX of 1793. And the Court added: "He must prove his allegation that the land held by the defendant and which he claims to be *Lakhiraj*, is part of the *mal* land of the plaintiff. If he prove that fact and so that it was assessed to the public revenue at the time of the Decennial Settlement it may be presumed that the right under which the defendant claims to hold as *Lakhiraj*, commenced subsequently to the 1st of December 1790, unless the defendant gives satisfactory evidence to the contrary." In another case, decided the same day by the same Judges,[1] they adhered to the ruling in No. 860 of 1864 to the effect that section 30 of Reg. II of 1819 related only to suits for resumption of *Lakhiraj* created prior to the 1st of December, 1790 and held that, as a consequence of that ruling every suit alleged to be brought under section 30 was necessarily one to which the rule

[1] *Sonatun Okaur v. Mostafa Abdool Towab*, 2 W. R. 205.
[2] *Hurro Mohun v. Kooey Beharee Holder*, 2 W. R. 207.

1931

H. Seshagiri Mudaliar v. Madras Chamber of Labour

created by section 10 Reg. XIX of [illegible], of exemption from [illegible] applies. It may further be held, that the plaintiff was not entitled to claim that the suit was brought under section 10 of Reg. II of 1827 and that it be [illegible] to be allowed to amend his plaint and that, in such case, the case should be remanded for retrial. But that if the plaintiff did amend his plaint he must show on the face of it as required by the law of procedure what was the cause of action asserted and if it accrued beyond the period of limitation allowed by any law for commencing such a suit upon what ground an exemption was claimed.

There has been so far as their Lordships are aware, no appeal from the decision of a full Bench of the High Court. They have not been given the law to the Provincial Benches of that Court and the order of remand of which the present appeal complains is one which would have been given in accordance with them. The judgment in the case of *Abdul Ghaffar Sahib v. Poonai Chinna Ibrahim Sahib* [illegible] No. 276 of 1922 is in fact only a recapitulation of what had been decided and had been acted on in other of the above-mentioned decisions of the Full Bench.

No attempt was made at the Bar to impugn the correctness of the last-mentioned decision. It must be held therefore, to be settled law that the provisions of the 30th section of Reg. II of 1827 do not apply to such a suit as the appellant's and the only question which the appeal raises is whether, in holding so, the High Court has been right in remanding this and other suits similarly circumstanced for retrial. Whether on such a retrial the burden of proof should be cast on the appellant on which the High Court cast it, the plaintiff, is a matter on which there is nothing in the particular case which requires such an order of remand to be thought the wisest course to pursue.

Their Lordships are accordingly of opinion that the remand for re-trial of the suit as the plaint was not even corrected for an indulgence to the plaintiff whose suit if not so remanded ought to have been dismissed. The provisions of the 30th section of Reg. II of 1827 are not mere matters of form to be rejected as surplusage. The effect of it is to raise the case to be tried according to a procedure and presumptions prescribed by that enactment and the enactments [illegible] greatly

[illegible]

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Barrister
Buckinghamshire
v.
Maltby & Lumley
Rabbits

to the advantage of the plaintiff and prescription to the prejudice of the defendant. It follows that if the prescription was not applicable to the case there had been a mistrial.

Again, your Lordships took that no just exception can be taken to the ruling of the Real Court touching the burthen of proof which on the issues the plaintiff was to support. If the class of cases to which that of the present exceptional legislation is becoming every day more restricted, it follows that it lies upon the plaintiff to prove a prescriptive title. His case is that his *estate* land has, since 1760, been converted into *Estate*. He is surely bound to give some evidence that his land was once *not*. The High Court in the judgment already cited, has not laid it down that no man's title to any property can be established by proof of payment of rent at some time within 170 years, but by demonstrating a clear proof that the rent in question formed part of the consideration of the settlement the Perennial Settlement. His proof does not even prove the payment of rent as alleged on the defendant, who must make out that his tenure existed before December, 1719.

It may be objected that the result of this ruling may be that plaintiffs will be driven into the Courts and have practically they will have a remedy in asserting or recovering their rights. But this can only be, owing to want of the ability of the plaintiff to give some proof of the fact which is peculiarly within the knowledge of the defendants, from whom they claim, have been long in possession of the tenure unexplained. Nor is it, in their Lordships' opinion, to be regretted if in such cases effect is given to those presumptions arising from long and uninterrupted possession which were heretofore excluded only by the occasional production of a deed. Attempts to evade under the legislature which gave rise to them, pleading to acts of the nature and by preserving defendants from a burthen which does not make it more difficult to support.

The only other point to be noticed is, whether there is any peculiarity in the case which ought to take it out of the general rule. Their Lordships are of opinion, that there is not. Mr. Hoyer argues that the defendant had admitted that the various questions with the exception of the small grant to the longer claimed, were within the appellant's

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estate. But such an admission is obviously not sufficient to relieve the plaintiffs of proof that they were, as plaintiffs, in receipt of rent. It was at most an admission that the tenants were within the ambit of the estate, not that they had ever been its tenants. In fact the defendants strenuously asserted the contrary. The appellant, therefore, having failed to give any evidence to support the amended plaint, the decree dismissing his suit was right.

In the other appeal (*Hurro Hurry Roy* v. *Nubo Chunder Sarkar*) the suit was also, as in fact it brought under section 9 of Bengal Reg. II of 1819, though to enforce a claim under section 6 of Reg. XIX of 1793. In fact, in this case there was a preliminary proceeding under the 28th section of Act No. X of 1859. The defendants (the respondents) undertook to prove that their tenure existed before December 1790. The Principal Sudder Ameen decided on the 9th of April, 1863, that they had failed to do so and decreed in favour of the plaintiff. This decree was affirmed on appeal by a division Bench of the High Court on the 11th of March, 1864. An application for a review of judgment was made on the 10th of June, 1864, on the ground amongst others that the appellant having stated that the cases were both made, the Court had erred in throwing the onus of proof on the defendants. The review was admitted on the 22nd and on the 24th of August 1865 the Court made an order in these terms: "A review will issue on the single point whether the case will be argued, which is the case the decision of which has been over-ruled by a subsequent ruling of the Full Bench, and not be altered and on the 8th of September 1865, the Court made the usual order for a remand stating that the onus of proving the *lawabad* to be within the provisions of Act X of 1859 was on the plaintiff and he will have to prove that the land was in existence at the time of the Permanent Settlement by showing that he has received rent for the same.

Their Lordships conceive that whether the present claim will be subsequently found to be sustainable, whether the remand was correct or not, is governed by the decision on the present appeal. They do not think that the plaintiff's case could be the specification of boundaries which he proposed to prove, the plaintiff might prove his case. The decree of the High Court really meant no more than that the onus of proof

Hurro Hurry Roy v. Nubo Chunder Sarkar

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It was however, argued by Mr Rowland Palmer that the remand in this particular case was improper, because the suit had already been finally decided in the appellant's favour, and ought not to have been admitted to a review, in order to give the defendants the benefit of what had been decided in other cases after such final judgment had passed. Their Lordships, however observed that the application for a review seems to have been regularly made within ninety days of the date of the decree sought to be reviewed pursuant to Sec 377 of the Code of Procedure and this being so their Lordships conceive that it was competent to the High Court to delay, if they did delay their final decision on that application until the law on which so much doubt existed had been settled by the judgments of the Full Bench of the High Court, which have been recently passed. Therefore in this case also, their Lordships think that the final order of the High Court was correct. They will, accordingly, humbly advise Her Majesty to dismiss both appeals. As the respondents have not appeared on either, it is unnecessary to say anything about costs.

NOTE

Perpetual [illegible] by Kings Proclamation are annexed each on [illegible] or grants of the ground and [illegible] made per [illegible] of 1861 and the existing law Acts of Legislature [illegible] which [illegible] was by Act 1 Geo IV cap XIX of 1821 made [illegible] the proceeds of the sale of the respective of the estate within the limits of which the lands are situate. 21 Geo [illegible] These grants unless [illegible] which were declared liable [illegible] and which [illegible] of [illegible] the grantees [illegible] 50 of the [illegible] 1859 [illegible] vests the lands in their estates, and collect the rents thereof.

There is an important difference as regards the burden of proof in suits [illegible] where the alleged [illegible] the Act of 1859 the burden of proof [illegible] under the Zemindary which became vested in the Government [illegible] the burden of proof [illegible] the Zemindar to prove that the land claimed [illegible] part [illegible] and was annexed with the

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[illegible]
Hari Hur
Mook[illegible]pa Hegde

Madras & Bombay
Bench

NARENDRA NARAIN ROY

v.

ISHAN CHUNDRA SEN *

[illegible]

1874
[illegible]

The case was referred to the Full Bench by Markby and Birch, JJ., with the following remarks:

Markby, J.—In this case it appears that on the 31st March 1858 the *Zemindar* granted to one Kristo Chunder Doss a *pottah* of 301 bighas of waste land at a yearly rent of Sa. Rs. 18-[illegible] to hold the same by raising *bunds* and excavating tanks on and by cultivating the said land himself or by means of tenants from generation to generation as a [illegible] tenure, and there was a stipulation that the rate of rent should never be changed.

Kristo Chunder held under the *pottah* until the 6th December 1870 when the defendant purchased and got into possession and was accepted by the *Zemindar* as his tenant under the *pottah* in the place of Kristo Doss.

On the 9th May 1871, the *Zemindary* was sold for arrears of Government revenue and purchased by the plaintiff and on the 23rd September 1871 the plaintiff delivered to the defendant a notice to quit.

Several objections were taken by the defendant, which have been found to be untenable, the only substantial question being that which we reserved for consideration, namely, whether the defendant is precluded from having formed one by the provisions of section 37 of Act VIII of 1869, or other words, whether he is a ryot having a right of occupancy. If he is although his rent may be enhanced according to law he cannot be ejected.

This question was raised in the lower Court by the fifth issue in a somewhat macerate form and we cannot say that either the evidence or the finding of the subordinate Judge

* Present: The Hon'ble Sir Richard Couch, Kt., Chief Justice, and the Hon'ble [illegible], Judges.

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Roy
v
Isham Chevalier Ben

[illegible] as [illegible] we think we may take [illegible] upon it that Kunta Chowdry entered upon the occupation himself and that he brought a portion of the land into cultivation himself and planted the way for [illegible] the remainder by excavating a large tank and bringing [illegible] on to the land by which a further portion of [illegible] brought into cultivation. [illegible] appears to be now under cultivation and [illegible] all of this is held by tenants under the defendant. The [illegible] to hold what [illegible] That [illegible] the defendant is entitled to a share in the produce.

Under these circumstances we think that the [illegible] Narain Roy was in the occupation [illegible] It was certainly not the tenant [illegible] and he was, for he was the [illegible] Now [illegible] our opinion he [illegible] The [illegible] confers or presupposes [illegible] other than those of [illegible] and [illegible] can be [illegible] being the last [illegible] as was [illegible] We therefore think that Kunta Dass was a tenant and [illegible] and [illegible] when he [illegible] his tenure to the defendant.

It seems to [illegible] that [illegible] was not [illegible] to a tenant and there was nothing to change [illegible] Therefore, he acquired a right of occupancy [illegible] within the protection [illegible] He had been in occupation [illegible] months and seventeen days when the notice was served upon him; he had, therefore, gained a right of occupancy himself, and there are many [illegible] that the possession of the transferee cannot be added to the possession of the transferor. [illegible] decision is in the 17 W. R., 179, and the only decision to the contrary to W. R. Vol. X. [illegible] we think [illegible] to be over-ruled.

The questions to be decided are therefore [illegible] these two — 1 whether the right of occupancy which [illegible] at the time of the sale to the defendant was [illegible] the defendant? and 2 whether [illegible]

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stitute an estoppel in favour of the lessee, and bring an existence which will prevent the plaintiff from ejecting the defendant?

The first of these questions has been not unfrequently said to have been decided in a Full Bench case reported in 7 W. R., 328; and if that had been the case, this reference would have been unnecessary. But the case is quite a different point, as may be seen by considering the circumstances out of which it arose. The defendant held a non-transferable tenure, and he had held it for more than twelve years. He then attempted to transfer it; but the Zemindar refused to recognize the transfer and sued him for his rent. The argument for the defendant was that because he had gained a right of occupancy therefore that which was a non-transferable tenure had become a transferable one; and that therefore his case should be dismissed. The question was not referred because there were any conflicting decisions upon the point, but because of its importance, and as pointed out by the Full Bench, no cases had ever gone to this extent. No argument appears to be necessary to show that this decision has no bearing upon the subject now under consideration.

Of the other cases, the following have been relied upon in favour of the transferability of tenures:—1 W. R. 80; 2 W. R., 208; 4 W. R. Act X., 7; and 11 W. R., 405. The following have been cited as to the opposite view:—9 W. R., 441; 11 W. R., 105; 15 W. R., 262; and 17 W. R., 137. It is not easy to say these cases to be quite sure of the grounds on which they proceed; but it is not, we think, possible to reconcile all.

Besides these cases it may be convenient to refer to cases in which it has been held that the ryot by subletting his land does not determine his right of occupancy, 9 W. R., 344; 10 W. R., 213; and 12 W. R., 111.

There is also a case in which it has been held that if a ryot, having a right of occupancy, transfer his right to another, the right of occupancy is not thereby forfeited, and the zemindar cannot turn the grantee out of possession,—11 W. R., 91.

It is this last case which renders the second of the above questions necessary. There is, it is true, no other decision upon the very point, but it appears to us that the two questions are

so closely connected as to make it desirable that both should be considered together. The two questions raised are therefore, those above stated.

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Baboo Sreenath Doss for the appellant contended, before the Full Bench, that though the defendant may be regarded as a ryot yet he is not protected from being ejected from the land by reason of his not having a right of occupancy thereon under the provisions of section 6 of Act XI of 1859.

The record shows that on the 6th of May 1871 the appellant purchased the zemindary for arrears of Government revenue and on the 22nd of September 1871 he gave the defendant, who was then in possession, notice to quit the land. At the time when the notice to quit was given the defendant (respondent) had only occupied the land for a period of seven years one months and seventeen days. Section 6 of Act X of 1859 says:—

"Every ryot who has cultivated or held land for a period of twelve years has a right of occupancy in the land so cultivated or held by him, whether he holds under a pottah or not so long as he pays the rent payable on account of the same." The respondent having only been in possession of the land for eleven years one month and seventeen days has therefore acquired no right of occupancy in the land himself. It is true that Krista Chunder Doss the original ryot had a right of occupancy because he had cultivated the land for a period of twelve years from the time the permanent settlement was made, but Krista Chunder Doss' right of occupancy cannot be transferred to the respondent, inasmuch as it has already been decided not only in the case of *Nobin Chunder Roy and others* [1] but also in a full Bench decision in the case of *Gendhari Pershad v. Hurromoni Dossi and Bank Hazra* [2] that a right of occupancy is not saleable.[3]

Moreover in the last paragraph of the judgment of Sir Barnes Peacock, p. 528 he says: "Speaking for myself I am not at all sure that a right of occupancy granted under section 6 of Act X of 1859 is necessarily heritable," and also the case of *Dendandoo Roy v. Ramdhone Roy*.[4]

A right of occupancy therefore means a personal right which may be acquired by a ryot either by cultivating or holding land

[1] 11 W. R., 403. [2] 7 W. R., 528. [3] 9 W. R.

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for twelve years and upwards and not may be acquired by a tenant from his predecessor who had occupied the land for that period.

In the case of *Hurro Sundari Dassee v. Hurro Nath Aich* Mr. Justice Phear says: "It seems to be more than doubtful whether any evidence could be given that a bare right of occupancy under the Act was transferable irrespective of the will of the landlord, and the case of *Issur Sirdar v. Ram Kishen Roy and others v. Nemai Aich Sircar* is under the circumstances, therefore, Kristo Chunder Dass could not transfer any part of such right to the respondent.

With regard to the second question it seems clear that though a right of occupancy is not transferable it is still not an exception to hold that by having sold the land to the respondent he has entirely abandoned not only his right of occupancy but also all title and interest in the land.

Baboo Gopal Lal Mitter for the respondent submitted that the right of occupancy which Kristo Chunder Dass held was transferable to the respondent under section 6 of Act X of 1859. The last paragraph of section 6 says:

"The holding of the father or other person from whom a ryot inherits may be treated as the holding of the ryot within the meaning of this section. The word *inherits* here has a wider signification than the ordinary technical one of succession from father or other ancestor to the son. It contemplates every right of succession which a ryot may derive not only from his ancestors but also from any relation who has cultivated the land for twelve years or more. Otherwise the words *or other person* in the Act are unnecessary and can have no meaning. It would be unsupportable that the words *or other person* mean an *heir*, because if a ryot can inherit from his father, it necessarily follows that he can inherit from his grandfather or other ancestor to whom all of the words *or other person*."

In the case of *Hurro Sundari Dassee v. Hurro Nath Aich*, *Hurro Nath Aich*, it was held that where the Zemindar consents to the transfer of a tenure from one ryot to another the possession of both must be considered to be continuous and the right of occupancy to date from the time of the first holder."

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Again, in the case of *Hurronath Tewaree* v. *Bissesur Mozoomdar*[1] the Judges say:—"The question then arises—Is a right of occupancy a transferable tenure? We think that it is so transferable. A right of occupancy is alter no a perpetual lease, the holder of which cannot be ejected so long as he pays a fair and equitable rent. There are many similar rights common in different parts of Bengal such as the *patni* of Rungpore, and the *howlas* and *zemaats* of Burdwan, which are in effect in no respect higher than that of a right of occupancy, inasmuch as they are mere personal rights, which are and have always been held transferable as well as heritable."

With regard to the second point it has been clearly decided in the case of *Ameeroodeel Mundul* v. *Hurish Pershad Mundul*[2] that the mere transfer of a right of occupancy does not work as a forfeiture of the rights and interests of occupant ryots themselves in the land. Therefore the respondent cannot be ejected inasmuch as he is now holding from Krista Chunder Dass, in whom the right of occupancy still exists, in spite of the transfer.

The judgments of the Full Bench were delivered as follows by

COUCH, C. J.:—I concur in the judgment by which the case is referred to us. It is found that Krista Dass was a ryot, and he continues to be so down to the time when he sold his tenure to the defendant. The way in which the case comes before us does not allow us to consider whether Krista Dass could or was a ryot at will. We must take the fact as found by the two learned Judges. I would be content to rest my decision upon the facts which appear in this case. I should have found that he was a ryot.

The first question to be considered is whether the right of occupancy which Krista Dass had at the time of the sale to the defendant was transferred to him?

This is a question which must be considered not according to any English law or any custom. In ascertaining what the law is to be understood to be, we must go by the rules for deciding what rights of occupancy where there is a custom to transfer, or by the

[1] 1 W. R., 39. [2] 11 W. R., 94.

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cases the landlord or *zemindar* may be supposed to have allowed the ryot to occupy according to the custom. If the ryot has by custom a right to transfer, the landlord may be supposed to have assented to the right of occupation which he gave to the ryot being transferred by him. There may be many cases in which a ryot may have a right by custom to transfer. We must exclude all these from consideration in answering the question.

In my opinion it is to be answered solely with reference to the words of section 6 of Act VIII B. C. of 1869 by which the right is given not for the first time but on which it now depends. And whether when Act X of 1859 was passed, this was the creation of a new right to a ryot, or the recognition in the legislature of an existing custom to allow the ryot to continue to hold does not make any difference in the construction of the Act. If the Act creates a new right we must look at the words of it for what the right is and if it recognizes a custom or recognizes it only to the extent expressed, and the result is the same.

The words of the section are that every ryot who shall have cultivated and held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under a pottah or not so long as he pays the rent payable on account of the same. But this rule does not apply to lands which are or were held belonging to the proprietor of the estate or tenure and let by him on a lease for a term, or year by year, nor as regards the actual cultivator) to lands settled for a term or year by year, to a ryot having a right of occupancy. The holding of a father or other person from whom a ryot inherits shall be deemed to be the holding of a ryot within the meaning of this section.

These words appear to me to point to a ryot having the right of land cultivated or held by him and so long as he pays the rent, and to the right not being one which can be transferred to some other person. It is a right to be enjoyed only by the person who holds or cultivates and pays the rent, and has done so for a period of twelve years. It does not speak of his acquiring a right which he might, having acquired it, transfer or make use of as a subject of property, but it seems intended to secure to a ryot who has cultivated or held for

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twelve years a continuance of his occupation or holding as long as he pays the rent. And the provision at the end of the section, by which the holding of a former or other person from whom the ryot inherits or is to be deemed the holding of the ryot, supports this construction for it appears to show that, except in that particular case, the holding must be entirely by the person who claims the right. There is a law which imposes a restriction upon the proprietary rights of the *Zemindar* or landlord, and a ryot cannot claim under it anything more than the words clearly give to him. There are not here, in my opinion, words of so doubtful a meaning that we should consider we were to would be just or equitable that the ryot should have the power to transfer. The ordinary construction of the words appears to me to be that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property which could be transferred. I would therefore answer the first question by saying that the right which Kenaram Roy had at the time of the sale was not transferable. (In question as I have said), is solely upon the Act and ordinances of the customs of any custom.

The second question is whether if it was not transferred, it still continues in Kenaram Roy's heirs and being an existence, will it prevent the plaintiff from getting the defendants? Now, if a ryot having a right of occupancy endeavours to transfer it to another person and, in fact, puts the occupation and ceases himself to cultivate or tend the land it appears to me that he may be rightly considered to have abandoned his right, and that nothing is left to him which would prevent the *Zemindar* from recovering the possession from the person who claims under the transfer. And not only may he be considered to have abandoned it but if the right which is given by the law is one which exists only so long as he holds or cultivates the land, when he ceases to do that by losing his occupancy right and putting another in his place his right is gone and cannot stand in the way of the landlord's recovering possession. If it were not so, the law would become nugatory. The position of things would be that the transfer by the ryot is nugatory, and gives the transferee no right to the possession but the ryot could not recover possession from the transferee as he would be

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bound by his act of transfer, nor could the landlord recover possession because the outstanding right in the ryot would be in his way. The result would be that although the transfer is invalid the transferee would be able to keep possession and to set the landlord at defiance. I think in this case it may be considered estopped that the ryot has abandoned his right altogether and therefore it cannot be set up as an answer to the suit by the landlord for possession or that no right has ceased, has been put an end to, because it existed only so long as the ryot himself continued to hold or cultivate the land. I would, therefore, in answer to the second question, say that any supposed right which may be in existence in Kristo Doss or his heirs will not prevent the plaintiff from ejecting the defendant.

JACKSON, J. I entirely concur in the judgment which has just been delivered, and have very few words to add. I should be inclined to describe the right whether created or recognized by section 6 of the Rent Act, as being a right resulting from the connection between the cultivating tenant and the land which he occupies for a space of twelve years. The Act expressly declares that the holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot, and there I think one may say that the well-known maxim *quilibet manus*, etc., would apply.

As to the second question, the answer appears to me to be very clear for by the sale out and out to another person, the ryot voluntarily terminates that connection between himself and the land which he had occupied which is necessary to the existence of the right of occupancy. The law allows a sub-letting by a ryot who has a right of occupancy, though it does not permit the growth of a right of occupancy within a right of occupancy. So long as the ryot having a right of occupancy merely sub-lets the land, he maintains that connection between himself and the land which is essential to the existence of the right. But when he has transferred his right to another, he no longer maintains that connection.

I wish also to say that I expressly concur in the observations which the Chief Justice made at the outset of his judgment, namely, that we are dealing with this case on the facts found by the learned Judges who referred it, and by that we are limited

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There is only one other observation which I wish to make as to the case which was referred to in [illegible] W. R. [illegible]. I do not apprehend that the learned Judges who decided that case meant to suggest that if a ryot having a right of occupancy had parted with his right by transfer and [illegible] evicted the transferee as having no right to occupy the land, the ryot might afterwards come in and set up the right he had voluntarily parted with as entitling him to enter upon the land. If however, any such [illegible] should be set up in any other case, it will doubtless have to be considered.

Pontifex, J.—I entirely concur with the Chief Justice. I understand the questions which are put to us to have reference solely to that peculiar right of occupancy which I may call the creation of section 6 of [illegible], and that is the matter which is now before us. [illegible] I understand, as the Chief Justice has said, [illegible] legal effect to enter [illegible] the right to hold and occupy the land in the event of [illegible], or otherwise. And I am of opinion that upon this hypothesis the questions which have been put to us in this reference are both immediately answered in the negative when the view is taken of section 6 [illegible] I think [illegible] the effect that the right of occupancy which is [illegible] neither [illegible] the subject of a personal [illegible] proprietary right. I think that there can be no right of occupancy under the terms of this section other than to a person who is cultivating or holding the land as a ryot in the manner which is mentioned in this section, and that he alone [illegible] have the right when [illegible] cultivating or holding the land, and then only if he has cultivated or held the land as a ryot for a period of twelve years according to the rule for estimating that time which is prescribed in the section, and that rule is that only the actual cultivation or holding of the person who sets up the right, and in case where he has taken the cultivation or the holding of the land [illegible] from a predecessor, then constructively the cultivation or holding of that predecessor, counts. The section does not give [illegible] to any one other than the person who has actually held or cultivated land for the period of twelve years either by himself alone or by himself and his predecessor, from whom he has [illegible] by

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inheritance together, the right of occupation which is the subject of the section. And if this is so, then it seems to be plain upon the facts which the reference brings before us that Ishan Chunder Sen, the defendant in the case has not a right of occupancy in the land which is the subject of suit, because he has himself not cultivated or held it even for a period of a little more than seven years, and the person, who preceded him in the cultivation or holding thereof was not one from whom he took it by inheritance. His predecessor in the cultivation or holding was Kosto Doss from whom he took by purchase. In that state of things he is not entitled by the words of section 6 to add any years of Kosto Doss' holding to the years of his own holding. And certainly Kosto Doss, in the view that I have taken of the section, can have no right of occupancy in the land, because he is not now cultivating or holding it but, on the contrary, has long been out of the occupation. For he has not cultivated it, he has not held it in any sense whatever during the period of the last eleven years and upwards. To use the words of the section, he is not a person who is in occupation or holding the land.

The Second branch also of the second question which has been referred to us seems to be answered in the negative by the decision which is reported in 20 W. R. 139—a decision, the correctness of which has not yet been impeached or reported by the decision on Special Appeal No. 1021 of 1872.[1]

I concur in the judgment which has been delivered by the learned Chief Justice, and have nothing substantial to add to it. I ought, however, perhaps to remark, with regard to an observation which has been made on the case reported in 20 W. R. 139, that it was obviously not the intention of the Bench which passed that decision to say anything positive as to whether or not the grantors or transferors of the *patni* in that case at all had, on the events which had happened, any right to regain possession of the land at the hands of the *Zemindar*. All that that decision decided was that whatever the rights of the transferors as against the *Zemindar* might be, those rights did not prevent the *Zemindar*, under the circumstances of the case from recovering possession of the land from a stranger.

[1] 20 W. R., 478.

Mitter, J.—I concur with the Chief Justice in thinking that both the questions referred to us should be answered in the negative.

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v.

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NOTE

Under Act X of 1859 as well as under Act VIII of 1869, B. C. [illegible] [illegible] R. [illegible] A. [illegible] [illegible] [illegible] [illegible] R. 49 Cal. 154 [illegible] [illegible] [illegible] [illegible] [illegible] R. [illegible] [illegible] W. N. [illegible] [illegible] [illegible]

The [illegible] [illegible]

NOGENDER CHUNDER GHOSE [1]

v.

MAHOMED ENOF

[Reported in 10 B. L. R., 401 P. C., 3 P. C. J. 151, 18 W. R., 113]

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May 2.

Their Lordships delivered the following judgment:

The subject matter in dispute on this appeal was a portion of land thrown up by the Karnafooli river a navigable and tidal river in the District of Chittagong.

The appellants are the representatives of one Nundoocoomar Ghose and as such, are the proprietors of Touzi No. 1 Bay Sing, situate on the east or right bank of the river. That estate appears to have been one of the subjects of a certain Government revenue survey, and as there are now settled and suppressed three mouzahs named Kalagaon Goomra and Lakhoea, at which the Government papers made on the occasion of that survey are set forth in the record.

The respondents attack from the Collector so far as it is necessary to do for them are the proprietors of an estate known as Touzi No. 1 Kumbhara. A lying and situate on the western shore or bank of the river. That estate was also surveyed and measured in or about the year 1865 and the Amins [illegible] of the villages included in Lakhoea were set forth in the record.

These parties claimed and respectively have not appeared on the appeal, which has been therefore heard against them *ex parte*. Their title, however, has been fully and ably supported by the learned Counsel for the Government who is on the same interest with them.

From what has been stated it appears that the estates of the appellants and these *Touzi No. 1*, which it will be convenient to call the respondents speaking of the Government, whenever it is necessary to do so as the Government were as originally measured and settled, bounded and separated by the Karnafooli

[1] Present: The Right Hon. Sir James W. Colvile, Sir R. Phillimore and Sir Montague E. Smith.

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Some time before 1847 there were three principal main and navigable channels [illegible] of which it is only necessary to specify two, Char Dhurmeean and Char Dekhun. A settlement of these was made by Government with the respondents in 1847 the assets assessed on Char Dekhun being Rs. [illegible]. At the same time there was said to have been at least one petition complaining of this proceeding but, for the purposes of this litigation, it must be assumed that the lands in question were the property of Government and were duly granted to and settled with the respondents. And it appears from some of the papers that they were treated as appurtenant to Mouzah Bakolia.

Before the cut [illegible] the river had carried away the west of Char Dhurmeean, but had formed a new one on the easterly [illegible]. Now as Dhurmeean river was undoubtedly the channel which was known as Lower Bamni Coar, was settled by Government with the respondents in lieu of Char Dhurmeean in December, 1852.

Besides the alluvion [illegible] the river had left or [illegible] thrown up a considerable quantity of other land towards the eastern shore. This included the land now in suit and much of it was then above water. The award shows that Government determined to treat it as [illegible] under Act IX of 1847 as an island in a large navigable river, but that, having regard to the claims of the proprietors in the neighbourhood, it was in order to avoid [illegible] settled by the Collector more than eight years should be determined and thereupon [illegible] proceedings under Act IV of 1850 before the Magistrate would [illegible] on the *proof* [illegible] eight years' possession [illegible] sixteen different [illegible]. That officer began by directing the *Darogah* to make a local [illegible] and cause a map to be prepared. The result of this was the *Darogah's* map No. 1 which is in evidence and [illegible] report of the result. The map shows four perennial [illegible] the eastern shore of the main channel of the river. A, B, C and D. Of these A and B are coloured green and represent the land then in dispute. C and D are coloured yellow and are stated to be lands which had been settled with the respondents. It must [illegible] believe [illegible] admitted to be the Lands of Char Watar [illegible]

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is not the Dikoo Choo, or whatever remnant of that *choo* is, still matter of dispute. But it is perfectly clear that it was, in 1852, treated as the land which had been settled with the respondents and was then in their undisputed possession.

A was divided into several portions, and the result of the Magistrate's proceedings was to award possession of these two different claimants (or rather border tribes and Nirmatty Nadavarayan Dessai who then, as managers or otherwise, represented the estate of Arumbonaram Ghose), getting part and the respondents getting the largest portion, being to the west of the old channel of the river which was assumed to be the settled Choo B. It is however unnecessary to pursue this part of the case, since the title to no part of A is now in dispute. It was claimed by those who then represented the appellants' estate as a reformation on the site of that part of their Mauzah Kalagam, which had been previously submerged or washed away by the river. It was claimed by the respondents as formed by alluvion to the east of the Dikkoo Choo, where the *kudi kanal* remained in their undisputed possession. The *Sirdar* found that Choo B was an accretion to the river marked C, which had been washed away by the respondents; but he also found that it had been formed by alluvion to the place where the lands of Mauzah Kalagam belonging to the appellant's *jemindary* were formerly broken, and that during the obstruction no land was thrown off from the said Mauzah to the said *choo*. The Magistrate's proceedings show how that other dealt with the question of possession. He seems to have considered that the legislature was bound to order water at flood tide, could not have been effectually in the possession of any of the parties that claims founded on reformation upon a site capable of identification could not be made out by any but a regular civil suit, and that the silence of the section bespoke to lands not in dispute constituted a *prima facie* title by accretion on which he ought to award possession. He accordingly did award possession of B to the respondents as the borders of the settled Choo C, and left those who represented the estate of Arumbonaram Ghose to their remedy by civil suit. The date of this proceeding was the 22nd of December, 1854.

The present suit was accordingly brought by Mr Ragun who had been appointed Receiver of Arumbonaram Ghose's

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estate by the late Supreme Court of Calcutta. It was not, however, commenced until the 3rd of May 1871, more than six years after the date of the Magistrate's award. The appellants seek to account for this delay by attributing it to circumstances connected with the administration of Noondomarain's estate. However that may be, it is obvious that the consequences of this delay must for the most part have operated equally to the detriment and the prejudice between the parties by means of the loss of evidence, or the intermediate changes caused by the action of the seasons, or by time upon the appellants. The suit as originally brought was to recover possession of 71 bighas of land and the defendants to it were not the only claimants to 71 bighas of land, but also Hurro Lal Mahoot and some of the sixteen claimants left to the Magistrate and the landowners, who had been summoned partly as a reformation parties (being part of the whole number of the dissatisfied villagers of Mouzahs Kasimpur, Chitkara and Lakhanpur and partly as an accommodation to the Collector) was afterwards made a party to the suit, Government having no interest adverse to the claim of the appellants, inasmuch as it was entitled to the additional revenue assessable on the lands in dispute if they were no appendage to the Ameenabad Pergunnah, whereas it was entitled to any additional assessment thereon if they were a reformation of the appellants' lands and therefore included within the limits of the Pergunnah [illegible].

The first proceeding in the suit which it is material to notice is the local inquiry made under the order of the Court by the Assistant Master, Mr. Ameer Ali. His report bears date the 20th of December 1871, and the map accompanying it is No. 1. The report and the map showed, amongst other things, that of the 71 bighas of land claimed between 8 and 9 bighas were composed or formed part of a tank marked on the map with the Bengali letter [illegible], and were in the possession of the defendant, Hurro Lal Mahoot, though claimed adversely to him in another suit by one Mohun Mahoot. A partition was afterwards effected by Mr. Ameer Ali between the parties who admitted the appellants' title, and left open only the question touching this portion of the land claimed as within the Mahoot as defendant. The report and map proved that

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between 11 and 1 drawn forming a part of the land claimed, composed the 1 & 1 marked on the map with the Bengali letter ৭ (ga) and that they were held by the defendants, the ancestors in fact Kowshan Ali on the strength of the Magistrate's award. The son and representative of Abdoo Ali, one of these defendants, afterwards made a compromise with the Receiver admitting the title of the appellants in respect of his share which comprised between 1 or 2 drawn of the disputed land. It is not easy if possible to distinguish these 1 or 2 drawn on map No. 1 but they are separated on map No. 20, which will be afterwards mentioned. The result of the Amin's investigation and his report was altogether in the appellant's favour. He found that as to the land in the two *dhuks* was a reformation on which no local enquiry and measurement was necessary in connection with the *khas* appertaining to the dilapidated *Mouzas* of the appellant's *Zemindary* and in paragraph 7 of the report he seems to intimate that no part of these Dakhin was to be found on the disputed land, and that the latter could not be constituted by any *diaras* formed on the site of any part of the recorded Mouzah Bauloia. The last sentence of the paragraph, however, suggests a doubt whether he exactly understood the respondent's case, and did not make a due reference between Mouzah Bauloia as originally settled, and the Char Dakhin to which, as they alleged, the latter had spread but asserted. The map did not give in detail the *dags* by which the relative position of the site was said to have been established.

The suit at one stage of it was transferred from the Principal Sudder Ameen to the Zillah Judge who ordered a second local investigation to be made by another Ameen named Gungoo Churnder Dutt. His report and the map made by him is that numbered 21. This report and map purporting to be founded on local survey the comparison of deeds and the examination of witnesses, go to establish these facts. 1st, that the whole of the *chur* marked A on that map being all the land that now remains in dispute, was a reformation on the site of the appellants' dilapidated Mouzahs, and, that the *chur* marked B was a similar reformation but comprised the lands in respect of which the compromises with the Minor and the heir of Abdoo Ali had been effected and 3rd that the Char Dakhin,

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settled with the respondents [illegible] has been objected to as not being recorded in the Wasil Baki and to which no objection was taken at the early stage of the proceedings for reformation under the second clause of the rule. These objections were specified by me as a ground for refusing to exercise my discretion in favour of the reformation of the deed contained in the supplemental agreement of the 4th and the assignment executed in favour of the appellants' estate is recorded and executed on [illegible]. No objection seems to have been raised by the counsel for the appellant and the date of the respondents' Mokarrab Khansa or Kowlat Bandi Chit. His view of the formation of the Ajmeri Lagat is thus stated in the 5th paragraph of his report: "The lagat Ajmeri as shown on the plan of the disputed lands of the plaintiffs at first on the eastern part of the river and gradually as sand has accreted on the eastern side to the plaintiffs' estate land. It does not seem that the allowance began as soon as the Kowlat Bandi was alleged by the defendants to be settled with them."

The suit was dismissed by the Judge who summarily dismissed it on the ground that it was barred by limitation. This was set aside by a decree of the High Court dated the 2nd of June 1876 which remanded the case directing the Judge to inquire and record whether the whole or any portion of the land claimed was in the possession of the defendants for more than twelve years prior to the institution of the suit, to try it on its merits and with reference to the provisions of Regulation XI of 1825.

The form of the remand seems to have led to another local investigation by a Deputy named Gopi Mohun Bhowmick whose report is dated the 31st March 1877, and whose map is numbered 24. The object of his investigation was to trace on the lay-out a land which had been settled with the respondents in 1871 or at all events more than twelve years before the commencement of the suit by the purchase of Messrs Bulloden but their Lordships consider that the attempt was useless as the fixing of Char Bagla which after the settlement had been excised in 1871 seems to have been treated as part of Mouzah Chakoria. The report was also adverse to the contention of the respondents. The investigation occupied fourteen days, and its result was to show that the

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boundaries of the respondents' settled land would fall within the then main channel of the river and considerably to the west of the disputed *char*. This report, therefore, by negativing the case of the respondents went to establish that made in favour of the appellants by the reports of the two *ameens*.

The cause then came on for a second hearing before the Judge who tried it on the following issues:—1st, whether the suit was barred by limitation; and 2nd, whether the land in suit was a formation on or an accretion to the original settled land in the plaintiffs' estate; and whether it formed a portion of or an accretion to the land settled with the defendants. He found both these issues in favour of the appellants. He seems to have held that the fact was determined by the result of the last local investigation which showed, as we say that the disputed *char* contained no part of the land settled with the respondents in 1847. On the second issue he found, in conformity with all the *ameen's* reports, that the land in suit was clearly a formation on the original site of the plaintiffs' estate, and was connected with it; and that the plaintiff was therefore, entitled to be placed in possession of it.

This decision was reversed and the suit dismissed on appeal to the High Court, by a decree dated the 1st of December 1868, which, on a re-hearing and review before the same Judges, was confirmed by an order dated the 1st of April, 1869. The present appeal is against that decree and that order on review.

Their Lordships cannot say that either judgment of the High Court affords satisfactory grounds for the dismissal of the appellants' suit.

The first deals only with the latest *ameen's* report, and explains away the effect of that by assuming that, in making his measurements he may not have taken a correct starting point. The Judge, however in his judgment, expressly states twice that no objection was taken before him to the *ameen's* starting point. The investigation was carefully conducted in the presence of the respondents' agents and it is difficult to suppose that the objection would not have been taken, if there was any foundation for it. Again, the learned Judges of the High Court proceeded on the assumed incompatibility of the case thus made by the appellants with the state of things which existed in 1854 at the date of the Magistrate's proceeding

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They came to the conclusion that Char Dokhin was the *kas* marked C in the *Burgash* map that the Magistrate had correctly decided against the title set up by the appellants and in favor of the respondents that the land now in dispute was an accretion to Char Dokhin and that the title had never been divested

But if for the sake of argument it be admitted that C in the *Burgash* map correctly represented what had remained of Char Dokhin, it would by no means follow that what constituted C in 1854 had not afterwards been washed away and the conclusion that it still existed as part of the land in dispute seems to be irreconcilable with the reports of all the surveys and notably with that of the late Mouzadar As their Lordships have already observed, the Magistrate by his proceedings seems expressly to have refused to accept as the region resulting from an identification of site, and seems to have held that the land in dispute being adhered to C was proved *ipso facto* to be treated as an accretion to it Again the judgments under appeal do not seem to their Lordships effectually to have met or deal with the questions raised in the cause

It is evident by all the appellants who were seeking to disturb the respondents' possession of nearly seven years duration, to show a good title to the land in dispute They seem to have set up an alternative to the claim by the respondents as a reformation on a site identical with that of their original Mouzah or as an accretion to their estate by reason of its being a formation opposite to their lands and only separated from them by a small channel fordable at low water The latter was the question finally discussed on the review and if it had been the only ground on which the appellants could recover then Lordships would have great difficulty in saying that they had made out a good title, or had shown that the Magistrate was wrong in treating the land in question as an accretion to the respondents' settled land represented by C and in awarding possession of it accordingly But it seems to their Lordships that, inasmuch as the result of all the local investigations including that of the *Burgash*, was in favour of the assertion that the land now in dispute was a reformation upon the site of the appellants' old Mouzah, the Zilla Judge was right in finding that fact to be proved The question then arises what

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is the legal result of such a finding? In the present case the title to the land thus shown capable of being displaced by any better title existing in the respondents? According to their Lordships' view of the evidence the part of Char Dhalkani the site of the decree formed part of the disputed land, which must be assumed to be correctly calculated in Char A, in the map No. 20 of Cruggan Chunder Ghose's Report. It was known not to be land in Char C on the *Hastings* map, but not correctly situate when measured at Char Dhalkani in 1851. How or when it is no doubt necessary with the object of the enhanced rent established in 1870 was not ascertained by the map of a Deputy Collector made in November 1868. No relief was sought in the alternative as to the rent claimed from Char Dhalkani. On the other hand it would then have been for the award of the Magistrate to be made if Char the *Hastings* map and correctly situate land situated with the respondents and then in their possession. And the latter map is not inconsistent with the Collector's map, No. 1.

Whilst therefore their Lordships think that the appellants have established the identity of the site of the mosque, to wit that it was originally erected on land *formerly* and afterwards washed away by the river they will for the determination of this appeal take as their ground that the land marked Char the *Hastings* map, though it has since been swept away existed in 1851 as a formed land and in the possession of the respondents and that the subsequent alluvion to it. They have already used the term "alluvion" because it appears to them that there is a substantial distinction between mere physical additions and that "accretion" or alluvion *strictu sensu* which by reason of its gradual and imperceptible formation is recognized by the law as belonging to the persons to whose land it is adjacent. In the present case, the evidence touching the manner in which the land in question was formed is extremely scanty and their Lordships are by no means satisfied that it was such as would make the land an "accretion" according to the strict legal definition of the term.

Their Lordships have now to consider what is the law applicable to the facts thus found and what are the rights of the parties thereunder. And the long and able arguments addressed to them on this subject render it desirable to review the law of

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subject which obtains in Bengal as declared by the settled provisions of Regulation XI [illegible] on the limited cases which [illegible] Government [illegible] the arrangements have contemplated cannot exist, [illegible] to be governed by such rules.

The 1st section of the Regulation, after specifying as the subjects which called for legislation the following cases, viz., 1st, the throwing up of [illegible] on the right of the stream or near one of its banks; 2nd, the carrying away of portions of land by a [illegible] current of water on the other, and an accession of land to the same [illegible] or subsequent years, caused by the [illegible] of the water on the opposite side; and, 3rdly, a [illegible] and sudden encroachment and destruction on the estates [illegible] the eastern and south-eastern limits of Bengal—events not [illegible] declared in the following sections would have come [illegible] the Provincial Courts at Fort William. The [illegible] section [illegible] that such cases, whenever [illegible] exists, shall [illegible] The 2nd section is that under which there is no [illegible] the general rule [illegible] which this section shall be applied to the determination of all [illegible] and disputes relative to lands gained by alluvion [illegible] by [illegible] either of a river or the sea.

The 4th section [illegible] two clauses:—

The first deals with land gained by gradual [illegible] alluvion [illegible] proprietor [illegible] thereof, and provides that it shall be assessed [illegible] in proportion to the [illegible] of the estate to which land or [illegible] it is annexed, subject to the right of Government to [illegible] additional revenue upon it.

The second provides that the [illegible] land is not liable to [illegible] assessment [illegible] to [illegible] of the land is not destroyed [illegible] in which case [illegible] the original owner.

The third makes a [illegible] land formed [illegible] navigable river, the bed of which [illegible] property of Government, or in the sea, the property of the Government of the country between which and [illegible] shore [illegible] lies, but provides that, if such [illegible] or [illegible] at any [illegible] year, the *char* shall be considered as [illegible] the term of the preceding year's [illegible] and shall be subject to the provisions [illegible]

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The 4th clause deals with future or small rivers, the beds of which have been recognized as the property of individuals giving them to the proprietor of the bed of the river. And the 5th clause provides that "in all cases of cultivation and disputes respecting lands gained by alluvion or by dereliction of a river or the sea which are not specially provided for by the foregoing rules, the Courts shall be guided by local usage if any be established as applicable to the case, and if not by general principles of equity and justice."

Two observations arise on this statute:

1. There is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of "alluvion," viz., land gained by gradual and imperceptible accretion, the common law doctrine of the Civil law.

2. No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, re-appears in the possession of the sea or river. But on the other hand there is nothing to take away or destroy the right of the original proprietor to such a case, which must therefore be determined by "the general principles of equity or justice" under the 5th rule.

That the right of the proprietor in the case last put exists and is recognized by law or by usage is established by at least two cases decided at this Board and therefore binding on their Lordships; viz., the case of *Hossein Ameer Bandi and others v. Hurgovind Pitty*,[1] and the recent case of *Lopez v. Muthoosamy Pillay*,[2] decided on the 11th July, 1870.

The former is a clear authority that the identity of the site may be established by maps and ancient documents, although by the long submergence of the land, all external marks and means of identification have been obliterated. It is not, however, very clear in that case whether the question between the parties was one of boundaries of the original estates, or of dispute between one party claiming the land as a reformation on his original land, and the other claiming it as an accretion under the last clause of the 4th section of the Regulation. The latter, however, was clearly the case between the parties in the case of

[1] 2 B. L. R., P. C., 6; 6 Moo. I. A., 272.
[2] 6 B. L. R. 521; 13 Moo. I. A., 497.

Lopez v. Muthusoohun Pillai[1]. It may, however, be said that that case is distinguishable from the present by its peculiar circumstances inasmuch as in the former the encroachment of the river had in the first instance swept away the surface of the plaintiffs' *Mouza* and made the defendant who held lands behind those so swept away for the first time a riparian proprietor and because the shifting of the boundaries by the preparation of the *Jamabundy* map and otherwise taken peculiar precautions to preserve and protect his right in the soil against his neighbour as well as the Government.

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It was, moreover, contended that some at least of the principles laid down in the case of *Lopez v. Muthusoohun Pillai* are in conflict with the powerful decision of this Board in the case of *Rajunder Narain v. Hurdeal Sahu*[2]. That case had not been reported when that of *Lopez v. Muthusoohun Pillai* was decided and does not appear to have been cited in the argument. Their Lordships cannot however perceive any inconsistency between the two judgments. The decision in the case of *Rajunder Narain v. Hurdeal Sahu* seems to have proceeded on two grounds, namely, (a), that it was not competent to the plaintiffs, who had alleged a title to the land as an accretion to their estate, to raise at the hearing of their appeal a different case, viz., "one" assertion of original ownership of the soil of the lands reformed, and (b) that had such a title been properly pleaded, the evidence failed to establish the existence of the site. The case of *Mahomed Isuph Rowther v. Hajee Ismail Sahib*[3] is cited in the judgment which throws no doubt upon the validity of such a title if properly pleaded and proved.

Again, the learned Counsel for the respondents and in particular Mr. Pontifex argued broadly that by diversion into a navigable river land is permanently lost to the original proprietor, and becomes the property of the State; and in support of this proposition they relied much on an American work, "Hook on Navigable Rivers" which they argued was the more deserving of attention by reason of the analogy which exists between the great rivers of America and those of India in their conditions and mode of action. The extracts

[1] 9 B. L. R. 321; 13 Moo. I. A. 407.
[2] 12 Moo. I. A. 23.
[3] 9 B. L. R. P. C. 4; 4 Moo. I. A. 419.

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however, does not appear to their Lordships to assist the respondents' case. The law of America seems to be less favourable to riparian proprietors than that of India or of England. For Mr Hall draws a distinction between estates consisting of a given portion of land, and defined by a mathematical line, though lying on the margin of a river, and those of which the river is the normal boundary. He holds that in the former case alluvion, however gradual and imperceptible formed, is the property of the State. And after dealing with this question he says (s. 128)—"Nevertheless, it is possible that by the action of the stream a change of the channel of a river, the land so granted may be partly lost. Nor is it unusual afterwards the land should be washed up again, it would belong to the former owner of the estate originally purchased and not to the State." This is inconsistent with the Civil Law, Dig. Lib. XLI. tit. 1, s. XXX, and with the law of England as declared in the passage cited in the case of *Lyon* v. *Fishmongers' Company*[1] from Hale 'De Jure Maris.'"

In India the point thus taken seems to be concluded by the authority of the decided cases. The learned Counsel did not contend for a distinction between a tidal river and a non-tidal river, which has ceased to be tidal. Their Lordships have no reason to suppose that in India there is any such distinction as regards the proprietorship of the bed of the river; though in respect of the mode of accretion, there must be some difference between the effects produced by the slow flux and reflux of the tide and the changes which are mainly consequent on the annual floods. Now if there is no such distinction, it is clear that the changes at Bungalpore, as in the case of *Lyon* v. *Fishmongers' Company*[1] and at Patna, as in the case of *Government Jogun Bundy* v. *Hurrosoondry Debia*[2] is a navigable, though no longer a tidal river. And, consequently, that these cases are direct authorities against Mr Pontifex's proposition. That Lordships are able to what is said in the case of *Lyon* v. *Fishmongers' Company*[1] to the effect that a proprietor may in certain cases, be taken to have abandoned his rights in the

[1] 5 H. L. R., 321; 33 How. L. A., 407.
[2] 2 H. L. R., 61; 4 How. L. A., 99.

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dulv stated. It is unnecessary to consider whether this might not be the result of a successful application for remission of revenue under Act IX of 1847, for in the present case there is nothing from which such a statement can be inferred. If an application for remission of revenue was made, that application was refused.

The appellants having thus established a *prima facie* title to the land in dispute as a reformation the question is whether the respondents have a superior title to it as an accretion to their settled estate. It is not easy to say what principle a title to alluvion by gradual accretion should prevail against the original ownership, established by identification of site, unless it be that where the accretion is so gradual as to be latent and imperceptible during the progress the law on grounds of convenience presumes the existence of title that no other ownership can be shown to exist, at the beginning.

In the present case it appears to their Lordships that such gradual and imperceptible accretion as the law contemplates is not proved, and that there are positive reasons why the title of the plaintiffs should be preferred to that of the defendants. The latter do not claim the land as an accretion to their original estate. They claim it as an accretion to the island cut up by the river, and not to the mainland. But it be granted that the final effect of the retirement of the river was to leave for ten years the bed of the stream, and that the subsequent cut, was beyond the estate of the plaintiffs' estate. The river continues to recede and alluvial appears and new land thrown up there is not proved, is mainly a deposit on the ancient site of the plaintiffs' land. Why should the ownership of that which is thus proved be altered by the fact that formerly a mainland was land forming the outer edge of it first appeared as an island. The *Durgahs* map seems to show that the river has changed the course of the river's action. Not as to the islands already observed, as there are trustworthy evidence which traces the history of the disputed land and shows that its gradual and imperceptible accretion it became attached to the which upon the whole evidence must be taken to have ceased to exist. Such a case as the present is not distinguishable from the ordinary case contemplated by the Regulation

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Their Lor ps a e o o e t the de i ive of identification, and to the a e of ec ou ging c a s of this kind on as ere t ev ence. They la d own no u le as to the s ictness of proof w ch the Cou s in I dia ma e uire in such cases.

They also consider that a title founded on the ori al ownership and identi a ion of a e a to be ascertained *prima facie* by the re ra ion on that sale. And i in the p e t case, it had a eared that a e a t of the land in dispute had been thrown up by o the ori al bou da ies of the appellants' estate a question might fairly ha e been between the appellants and the espondents whether that was to be taken to be an accretion to the estate of the la ers or to the actual *locus* of the matter. But on the evidence it was established that the whole of the land which was to be the subject of the suit was within the lines of the appellants' original estate. This being so, their Lordships are of opinion that the Zilla Judge was right in decreeing the whole to the appellants. And they will humbly advise Her Majesty to allow the appeal; to reverse the decree of the High Court and to order that, instead thereof, a decree be made dismissing the appeal to that Court, and affirming the decree of the Zilla Judge. The appellants must have from the respondents, the plaintiffs in the suit, the costs of the litigation in India and those of the appeal. There will be no order as to the costs of Government in the appeal.

NOTE.

This case was followed by the Full Bench of the Calcutta High Court as not only for the purposes of such reference or appeal can not be treated as land paying revenue within the meaning of Reg. XI of 1825; *Futtemoonissa v. Secretary of State*, I. L. R. 14 Calc. 47 affirmed by the Judicial Committee, I. L. R. 17 Calc. 98; *Secretary of State in Council v. Abdul Jamir*, 5 C. W. N. 676.

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v.

BROJONATH PAL CHOWDHRY.[1]

Reported in 11 B. L. R. 12 B. L. R. 181

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The case was referred to the Full Bench by Jackson and Bayley, JJ., with the following remarks:—

Jackson, J.—We think the question on the case should be referred to a Full Bench for decision, and the case to be referred should be this. The plaintiffs purchased on the 19th February 1870 the estate, and interest of Brojonath Pal and others in certain pitwahs, by a bottah as a transferable tenure. That sale was set aside and therefore did not become absolute until after the 24th June. In the meantime the Zemindar brought a suit against the pitwahs whose rents had been sold for arrears of rent and having recovered a decree against them caused the tenure to be put up to sale and it was sold on the 14th June, that is to say, before the completion of the sale to the plaintiffs. The purchase was on the 24th and was afterwards conveyed by pattah to Monohar Dass one of the defendants. The transfer under the pattah was not registered, neither did the plaintiffs make any deposit of the rent by the 15th Section of Act VIII of 1865 (B.C.). Can the plaintiffs contest the pattah notwithstanding the sale of it in the rent suit?

The cases which have been referred to and from which the conflict arises, are on the side of the plaintiff *Prem Chand Nundy v. Nistar Sundaree*,[2] *Ram Lochun v. Bhugwan Chunder Mitter* and *Thakur v. Purmanund Sahoo v. Hurro Chunder Bandopadhya v. Hurro Hurro Bose v. Nobo Kishen*

Present: The Hon'ble Sir [illegible] and the Hon'ble F. B. Kemp, Louis S. Jackson, F. A. Glover and [illegible] Judges.

[illegible]
[illegible]
[illegible]

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and see a judgment of the Judicial Committee — *Ameer* v. *Lutchmee Soor*.[1]

On the side of the defendants are:—*Khoobeeram Kur* v. *Nundkoor*;[2] *Gopal Mondal* v. *Sookhdeo*,[3] *Sheikh Afzal* [illegible] v. *Jones*,[4] a ruling by the Full Bench, which was however not a party to [illegible] on the point, *Bhuggo Persad* v. *Secretary of State*,[5] *Sookhdeo* v. *Ram Chunder*,[6] *Girish Chunder* v. *Secretary of State*, and *Issur Chunder Mookerjee* v. *Khelika Persad*.[7]

The judgments of the Full Bench were delivered as follows —

Garth, C. J.—The decision of the present question depends mainly upon the construction which is to be put upon sections 161 and 165 of Act X of 1859. These sections, I think, must be read together, forming as they do a provision for the sale of transferable tenures in execution of decrees for arrears of rent.

Section 161 says that "where a decree or an order of rent for the amount of an under-tenure which is by law or by the custom of the country transferable by sale, the judgment-creditor may make application for the sale of such tenure, and the tenure may be ordered to be sold in execution of the decree according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in such law for the time being in force."

By "tenure" is meant not the right or interest of any person in the land, but the holding or the interest which has been created by the lease; and, owing to the word its plain and ordinary meaning, it is that which is to be sold. If there had not been interest and the person who obtained a decree for rent was to be only entitled to sell the right and interest of the person against whom the decree was obtained it would not have been necessary to make the provision in this section as the decree might be executed upon all the property in the same manner as any other decree. It seems to be that by providing that the tenure shall

[1] 17 W. R. 167, P. C.
[2] 2 W. R. 141.
[3] 5 W. R. 26.
[4] 6 B. L. R. App. 71.
[5] W. R. 1864, No. [illegible] p. 68.
[6] W. R. [illegible].
[7] 4 B. L. R. 154 (note).

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be sold, more was meant than a sale of the property of the person against whom the decree had been obtained. And the words 'according to the rules for the sale of under-tenures for the recovery of arrears of rent due on account thereof' may seem confining to the procedure. The rules are regarded as law from the person against whom the decree is obtained, but as law in respect of the tenure.

The words, 'the latter part of the section, 'other properties,' do not appear to me to control the meaning of the first part. In many, if not in most cases, the tenure would be the property of the person against whom the decree is obtained, and then the words 'other property moveable or immoveable' belonging to the judgment-debtor would not be appropriate. I think it would be giving too great an effect to the words 'other properties,' to say that they show that the intention of the Legislature was not that the whole of the tenure should be sold, but only the right and interest of the judgment-debtor in it. When we compare the words of Act X with those of the Regulation which was repealed by it, and for which the provisions in Act X were substituted, it seems that some alteration of the law was intended. Act X professes to be an Act to amend the law relating to rent, and to consolidate Act. Many provisions in the Regulation were repealed and others are substituted for them. The part of the 7th clause of section 15 of Regulation VII of 1799 which would be applicable to the present question is as follows: 'If the defaulter be a lot-holder, the whole of the land of any other tenure which by the title-deeds is considered subject to the same is transferable by sale or otherwise, may be brought to sale by application to the Collector without satisfaction of the arrear of rent.' This authorises the sale when the lot-holder the person against whom a decree might be obtained, is the holder of the tenure. The Judicial Committee of the Privy Council in the case in 4 Weekly Reporter, 9, refer to these words, and consider that they are very material as to what cases were within the Regulation. They say, page 10, 'They were not the holders of an hereditary tenure, the words of Regulation VII of 1799 and were certainly not proprietors, in the words of the Regulation VII of 1822.' In Act X what which are capable of such a construction are substituted

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for the words of the Regulation. The Act says generally that if there is a decree for arrears of rent the tenure may be sold. There are no words limiting the process obtained against the person who was at the time the holder of the tenure.

There is a great difference between the Act and the Regulation which seems to show the intention of the legislature to give to the zemindar a more effectual remedy than they possessed before. The Act does not, as section 15 of the Regulation directs that transfers shall be registered. As far as regards the zemindar in ascertaining their rights over the property dealt with, it matters not to them, the latter are hereby required to register at the Sudder Jumma of the zemindaree to which their tenure may be attached all transfers of such tenures, or portions of them by sale, gift or otherwise, as well as all successions thereto and bequests among heirs or exchanges of portions. But it does not provide as Act X does (see proviso to section 12) that no transfer which is required to be registered shall be recognized, unless it has been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector. The strongest provisions of Act X of zemindars are omitted in Act X of 1859 than in the Regulation. It appears to me taking sections 12 and 19 together with the proviso, that it was intended that the zemindar should be at liberty to treat as the holder of the tenure and the person whom he might sue for the arrears of rent the person who is registered as the holder in the zemindar's books, unless any one could show that there had been a transfer and that there was sufficient cause for its non-registration. In such a case, a zemindar might find that he had been suing the wrong person. Taking these sections together I think that the zemindar, having obtained a decree for arrears of rent is entitled to sell the tenure, and that the person who has bought a transfer which he has not registered and cannot show a sufficient cause for not registering it is bound by the sale and cannot set up a title which he has acquired by a secret sale.

Section 19 appears to provide for cases where the zemindar has sued the wrong person. The real proprietor may come in upon the condition of depositing the amount of the decree, and may show that he was the owner of the tenure, and

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should have been sued. That was a case where one person, for a suit might be brought against another for the arrears of rent which ought to have been sued for without the real question being as to whether or not that the arrears claimed were due.

The question that I now state and which I stated in a former case, when I sat with Mr. Justice Glover is in accordance with the established practice of the Court. And in the conflict of opinion which there is amongst the learned Judges of this Court it is satisfactory for us to find that in the earlier cases the same was stated as I now suppose that we should decide.

In the case in the 7 Weekly Reporter, which was a Full Bench Ruling the late learned Chief Justice no doubt appears to have expressed an opinion contrary to that but it does not seem to me that the question that was and the question which is now before us. In the case in the Court in which the question had been raised was not referred to in that case and were not in any way the grounds of the reference to the Full Bench from that I suppose that it was not then intended to refer the present question. What was referred was the question as to whether or not the Chief Justice expressed an opinion on the question now before us. On the other hand in the 6 Weekly Reporter, page 54 which was also a Full Bench case Sir Barnes Peacock appears so far as we can gather from the cases to have been of the same opinion as myself. I do not think that it seems to me that we are not bound by the decision of the Full Bench in the 7 Weekly Reporter and I think the question now comes properly before the Full Bench for consideration and decision of any question between the Court. Looking at it as a question under the Act, I think the answer ought to be that the sale under the Act did not operate to put the purchaser.

KEMP, J.—I concur.

JACKSON, J.—I am of the same opinion with the learned Chief Justice. I also think that we are not concluded by the judgment of the Full Bench in the case in 7 Weekly Reporter. The decision of the Full Bench on the contrary appears rather to have been a decision upon a wholly similar

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point on a different ground than a decision upon the question now before us. If it were otherwise, no doubt under the rules for references to the Full Bench we should probably have to govern ourselves by that decision. The simplest and only safe mode of leading the question before us appears to be upon the construction of sections 105 and 106 of Act X of 1859, taking those sections along with the other sections of the Act. The modes of executing decrees passed under Act X were originally pointed out in the sections commencing with section 86 of that Act. The 86th section has been repealed and is replaced by section 17 of Act VI of 1862 (B. C.). That section declares generally what the procedure open to a decree-holder is, in these words: "Process of execution or mesne process to be issued in any suit brought under this Act, or under Act X of 1859, may be issued against either the person or the property of a judgment-debtor, but process shall not be issued simultaneously against both person and property."

Then in some of the subsequent sections particular remedies or modes of procedure are provided in particular cases. According to section 105 enacts:—"If the lease be for an annual rent in respect of an under-tenure which by the title-deeds, or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure," etc. There is a limitation of that section 105 where the person who has obtained the decree is a farmer in a joint undivided estate, otherwise, subject to the claim to be made under section 106, the decree-holder might apply for sale and the Court might proceed to sell the under-tenure. That procedure is quite separate from the course to be taken in respect of other immoveable property or in respect of which I conclude the Court would sell the right, title, and interest of the judgment-debtor but under sections 105 and 106 the tenure itself, I take it, is the thing to be sold. It is to be observed that the position of a claimant under section 106, and what the claimant has to do, are quite distinct from those of a claimant under the other sections of the Act. A claimant under section 106 is to allege that he is the proprietor of the under-tenure and was in lawful possession of it and has to deposit in Court the amount of the decree. That is provided in respect of claimants with regard to under-tenures and taking all

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the powers of these two sections together, it seems to me clear that the Legislature contemplated a separate procedure, and intended that the Court should go on to the sale of the under tenure itself. I cannot, therefore, on the ground that the under tenure in this case was liable to be sold, and that the plaintiff could not by means of his contemplated purchase at a sale in execution of a decree of the Civil Court recover the under tenure from the parties who had purchased it at a sale under Act X

Glover J.—I concur with the learned Chief Justice.

Pontifex J.—I agree with the learned Chief Justice.

Cur. adv. vult.—The original appeal was dismissed with costs.

NOTE.

This suit having been brought [illegible] a decree for arrears of rent of a tenure sold [illegible] and, having been dismissed [illegible] by the plaintiff [illegible] was upheld by the Privy Council. [illegible] 502. And see [illegible] the sale not liable [illegible] (Act X of 1859) [illegible] so liable to sale except on the ground of fraud (*Deen v. Hur Chunder* 1 I. R. 10 Calc. 496).

SONET KOOER

v.

RIMMUT BAHADOOR [1]

(Reported 1 I. A. 154, 2 Suth. P. C. 1.)

1874. February, 11

Their Lordships' judgment was delivered by

Sir J. W. Colvile.—The question raised on this appeal, though short, is somewhat novel and there appears to be little positive authority upon it.

It appears that Rajah Maloomun Singh, being a Hindu *Zemindar*, but having a Mahomedan lady domiciled in his house, granted the *mokurrery* in question in the name of one of the infant daughters of that family, Shurfoonnissa Begum. The grant was clearly intended to create an absolute and hereditary *mokurrery* tenure inasmuch as it contains the essential words, "generation to generation" which in documents of that kind have always been understood to have that effect; and their Lordships do not find in the particular language any special terms which would distinguish it from a grant of an ordinary *mokurrery* tenure. It is clear on the evidence that Shurfoonnissa Begum died before her father, and not very long after the creation of the tenure; and further, that after her death the father lived for life, and afterwards his widows were by the Hindoo law, as he was, entitled to receive the rent reserved from those in possession of the lands, the receipt for such rent being with no exception, taken in the name of Shurfoonnissa, the original grantee and in that exceptional way in the name of Burates Begum, her mother. One of the questions raised by Mr. Doyne is, what effect ought to be given to that reception of rent as a recognition of the tenure and an answer to the present claim to resume the lands included in it.

From this receipt of rent after the death of Shurfoonnissa, which must have been well known to the family, an inference may undoubtedly be drawn that the *Zemindar* either originally intended to make the grant for the benefit generally of his

[1] Present: Sir J. W. Colvile, Sir B. Peacock, Sir M. S. Smith, and Sir R. P. Collier.

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illegitimate born after the death of the ancestor was not that it should have that effect, and it is difficult to suppose that the widows were not for some time willing to act on some such view of the transaction. It is impossible, therefore, to treat the parties in possession as mere trespassers. The recognition of their interest by the receipt of rent from them would constitute some kind of tenancy requiring to be determined by notice or otherwise. Their Lordships however are not prepared to say that this circumstance is of itself sufficient to defeat the claim of the plaintiff in this suit. It may be that the ground upon which the decision of the High Court is to be supported, if supported at all, is that the plaintiff in the exercise of his person was, assuming the parties in possession to have a legal title, entitled to recover the land to the destruction of the tenure. That, of course raises the question which the High Court has dealt with, whether on the death of Sharfoonnissa without heirs the right to the possession of the land reverted to the original grantor or whether the tenure on such a failure of heirs should be taken to have escheated to the Crown.

The doctrine of escheat to the Crown in the case of a vacant inheritance was much considered by this Court in the case of *The Collector of Masulipatam* v. *Cavaly Venkata Narrainapah*.[1] In that case the property in question was a *Zemindary*. The last male *Zemindar* had died, leaving a widow who took a widow's estate, and upon her death there were no heirs of her husband to inherit the *Zemindary*. The *Zemindar* was, however, a Brahmin, and the point raised on the appeal was that on that ground the estate was not subject to the law of escheat. This contention was founded on the text of Menu, which says:—"The property of a Brahmana shall never be taken by the King; this is fixed law"; and also on a passage in Narada where it is said:—"If there be no heir of a Brahmana's wealth, even his domain, it must be given to a Brahmana; the wealth of the King is tainted with sin." It seems to have been admitted on the case that the British Government had at least the same rights that the ruling power would have had under the Hindoo law, the question being whether that limitation upon the Hindoo law was said to impose on the right of the Hindoo Rajah or King

[1] 8 Moo. I. A., 500.

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Bonee Koer
v.
Hemmut Bahadoor

was to prevail against or fetter the rights of the Crown. Lord Justice Knight Bruce, delivering the judgment of the Committee, said:—"It appears to their Lordships that, according to Hindoo law, the title of the King by escheat to the property of a Brahmin dying without heirs is a right, as in any other case, to prevail against any claimant who cannot show a better title, and that the only question that arises upon the authorities is whether Brahminical property so taken is in the hands of the King subject to a trust in favour of Brahmins." And in a subsequent passage of the judgment he went on to say:—"Their Lordships, however, are not satisfied that the Sudder Court was not in error when it treated the appellant's claim as wholly and merely determinable by Hindoo law. They conceive that the title which he sets up must rest on grounds of general or universal law. The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband a Brahmin, whom she succeeded as heiress at law. If upon his death there had been any heirs of her husband, those heirs must have been ascertained by the principles of the Hindoo law. But by reason of the prevalence of a state of law or the reverse, which renders the ascertainment of the heirs to take on the death of an owner of property a question substantially dependent on the *status* of that owner. Thus the property being originally, and remaining, alienable, might have passed by sale, gift, or devise in succession to British subject to foreign European owner to Armenian, to Jew, to Hindoo to Mahomedan, to Parsee, or to any other person whatever his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner being absolute owner any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindoos and Mahomedans by positive Regulation: in other cases it rests upon the course of judicial decisions." And the final conclusion of the Committee was thus:—"Their Lordships' opinion is in favour of the general right of the Crown to take by escheat the land of a Hindoo subject, though a Brahmin, dying without heirs; and they think that the claim of the appellant to the *Devuttur* in question (subject or not subject to a trust) ought to prevail unless it has been absolutely

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or to the extent of a valid and subsisting charge, defeated by the acts of the widow [illegible] her life time. In the latter case the Government would be entitled to the property subject to the charge. In a subsequent case relating to the same estate (*Bhoot Kooer alias Bhoot Koonwar v. Hummut Bahadoor*[1]) the question was between the Collector representing Government and a person claiming to have a valid and subsisting charge by an act of the widow—a charge which the widow was competent to create, and it was held that the Government took subject to the charge, and the suit was dismissed, but without prejudice to the right of the Collector as representing the Crown to release the charge and recover the estate. The property in dispute in this case was a *Zemindari*, but the decision would establish the principle that where there is a failure of heirs, the Crown by the general prerogative will take the property to escheat but will take it subject to any valid charge or affecting it. There, therefore, would be nothing in the nature of the tenure which should prevent the Crown from so taking a [illegible] subject to the payment of the rent reserved upon it.

It has been argued however, that the [illegible] being an independent *Zemindari* but being carved out of a *Zemindari*, stands upon a peculiar footing, and that on the failure of heirs, the *Zemindar* takes by right of reversion or if not strictly by right of reversion that the tenure results to him as the superior lord rather than to the Crown. The interest was clearly an absolute interest. It was also an heritable interest. It might have been sold as it was in Mr. Dorin's case under Act X of 1859 or a part of it might have been forfeited for the non-payment of rent but in no case the *Zemindar* could only have caused it to be sold put up for sale and sold to the highest bidder. It is the case, property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or to whatever law he was to be governed. It cannot, I presume, I think, be successfully argued that had the estate would have determined upon the death of [illegible] dying it had been held in the [illegible] without heirs, for the grant contained no provision for the lessee of the [illegible]

[1] 11 Moo. I. A., 619.

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Bonee Koonr v. Himmut Bahadoor

to such event. There seems, therefore, to be no ground for saying that the lands have reverted in the proper sense of the term to the *Zemindar*, and the only question is, whether, on the failure of heirs of the last possessor, he is entitled to take a tenure subordinate to and carved out of his *Zemindari* by escheat.

Their Lordships are of opinion that there is no authority upon which the power of taking by escheat can be attributed to the *Zemindar*. The principles of English feudal law are clearly inapplicable to a Hindoo *Zemindar*. On the other hand, it is clear that, if the *Zemindar* has not such a right, the general right of the Crown subsists, and must prevail.

On the whole, therefore, their Lordships think that the High Court have come to a correct conclusion in holding that, supposing the parties in possession have nothing but their possession to depend upon, a question on which their Lordships give no opinion, the superior title, under which alone they can be ousted from possession of the lands, is not in the *Zemindar* or his representatives, but in the Crown. They will, therefore, humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

Appeal dismissed.

NOTE.

It is made to the [illegible] that a grant of an estate in [illegible] differs from an outright sale of the estate merely in this respect, that the consideration in the latter case is paid and received once for all at the time of the grant, the consideration, or where there is a [illegible] portion of it takes the shape of a sum of money [illegible] rent to be paid or rendered periodically in perpetuity. In the grant of such a tenure no interest in the estate remains in the grantor, unless there is in the grant some valid clause of express reservation, except a charge to secure the due payment or rendering of the rent.

For the principles laid down in this case see also *Nil Mandal v. Narendra*, I. L. R., 17 Calc., 525, and *Secretary of State v. Hurbutrao*, I. L. R. 23 Bom. 276.

MAHARANI RAJROOP KOER

v.

SYED ABUL HOSSEIN.[1]

[*Reported in I. L. R. 6 Calc. 591 : 7 I. A. 240 : 4 P. C. J. 199.*]

1880
July 13 14

Their Lordships' judgment was delivered by

Sir M. E. Smith.—This was a suit brought by Maharaja Ramkissen Singh Bahadur to establish an asserted right to a *pain* or artificial watercourse and also to a *tal* or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the *pain*. The Maharanee, the present appellant, is his widow. Several questions, arising in the suit, have been finally disposed of in the Courts below, leaving for the consideration of their Lordships the main question, which arose on the special appeal before the High Court as to the effect of the Statute of Limitations upon two of the obstructions complained of.

The facts necessary to raise this question may be shortly stated. The Maharaja and his ancestors were the owners of Mehal Sonaut Parwariya in the district of Gaya, and the defendants were the owners of an estate called Monza Mora. The system of irrigation claimed by the plaintiff embraces an artificial *pain* which is fed by a natural river at a point to the south of the defendants' Monza. The *pain*, which runs from the south in a northerly direction, after traversing other estates enters Monza Mora and runs through it, and afterwards through other lands to the defendants' mehal. There is a branching from the main *pain*, a channel or smaller *pain* which helps to feed the *tal* claimed by the plaintiff. The *tal* lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the *pain*, and partly by the rainfall from these hills. It appears that there is another channel in a lower part of the *tal*, which runs from it and joins the *pain* at a point near a bridge described in the Mouzadar's map. It is said there were doors or sluices in the bridge by which the flow of the water had been to some extent regulated before the

[1] Present:—Sir James W. Colvile, Sir Barnes Peacock, Sir M. E. Smith, and Sir Robert P. Collier.

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question now arises with regard to them. The obstructions complained of were twelve in number, consisting of bunds, cuts, and other modes of obstructing or diverting the water from the *pora*.

The general result of the litigation below is that the plaintiff succeeded in establishing his right to the *pora* as an artificial watercourse, and to the use of the water flowing through it, except that which flowed through the branch channel, but failed to establish any right to the water in the *pora*, except to the extent to which the defendants, as the owners of Mouza Mora had used the water for the purpose of irrigating their own land. That generally stated, is the result of the findings as to the rights of the plaintiff.

It was found in the Courts below that all the obstructions were created by the defendants, and the plaintiff has succeeded below as to all the obstructions except two, which are numbered No. 3 and No. 10. No. 3 is a bund or mound cut on the side of the *pora* at a point below the bridge which has been spoken of. No. 10 is a bund, also below the bridge, and consists of hollow palm trees so placed as to draw off the water in the *pora* for the purpose of irrigating the defendants' land. No question arises here as to the fact that these two works are an obstruction of the plaintiff's right, and he would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the Statute of Limitations.

The Munsif has found that the Statute opposes a bar to the claim. The Subordinate Judge was of a different opinion, and reversed the Munsif's decree. On second appeal to the High Court the Judges of that Court concurred with the Munsif, and reversing the decree of the Subordinate Judge, affirmed the Munsif's judgment.

Before adverting to the Statute it is necessary to see upon what facts the Courts based their decisions. It appears that the Munsif found that these obstructions had been made more than two but less than twenty years before the institution of the suit. The Subordinate Judge found, that the two obstructions were recently made, and it may be inferred from his disagreeing with the inferences which the Munsif drew from certain accounts which were produced, and the comments he made upon the

1886

Sitharama Rajatuga
Kavi

Sital Das Hazra.

Judge and [illegible] Munsif [illegible] High Court [illegible] Subordinate Judge [illegible] Munsif [illegible] High Court [illegible] twenty years, they think that no prov[illegible] Section [illegible] inconsistent with the plaintiff's right to recover [illegible]

The Limitation Act, No. IX of 1871 [illegible] prescription, which are in their nature distinct. One [illegible] limitation of suits, and prescribes [illegible] bringing suits after the right to [illegible] relates to the mode of acquiring [illegible] not expressed. [illegible] Part IX of the Act and has [illegible] of ownership by possession." They enact [illegible] ownership by possession [illegible] "Where any [illegible] any other easement [illegible] peaceably and [illegible] Crown as an absolute [illegible] for twenty years [illegible] or air, any [illegible] or other easement, shall [illegible] which the enjoyment of the Matter [illegible] whether the [illegible] or on the part of [illegible] Act which [illegible] of twenty years shall be taken [illegible] years next before the [illegible] to which such period relates is contested."

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Maharaja Rajroop Koer

Syed Abul Hossein

On the assumption of fact made by the Munsif that these obstructions had existed for more than two years before the suit, he might be right in finding that the plaintiff had not had peaceable enjoyment for twenty years during which two years before the institution of the suit; and, therefore, that the plaintiff had acquired no title by virtue of this Statute. The object of the Statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years if exercised under the conditions prescribed by the Act, to give rise at most to a title to easements. But the Statute is not declaratory of the law; it is only prohibitory; not exhaustive. A man may acquire a title under it who has no other right at all; but it does not preclude a person from showing his title aliunde, or even a grant or agreement. There may perhaps think that in this case there is sufficient evidence upon the facts found by the Courts below, presuming the existence of a grant at some date not proved at trial, the extent of the facts which appear on the face, and the effect of the judgments of the Munsif and of the Subordinate Judge, to be entered in the register of the High Court. The evidence shows that the Court's account have been, that the pucca was constructed by the ancestors of the plaintiff a great many years ago—probably fifty years—certainly more than twelve years before the proceedings originated, and there is part of the evidence which indicates that after construction was accompanied with certain assertions on the part of the defendant, who was concerned there for any injury or inconvenience caused by the existence of the pucca. Thus long an artificial pucca structure on the land of another man at the distance proved by the Courts, and especially since at least known to the time of the obstructions complained of by the plaintiff and his ancestors, and during which had to deal with the subject might most indeed ought to refer such a long enjoyment to a legal origin, and under the circumstances which have been evidenced to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendants' land by which the right was created. That being so, the plaintiff does not require the aid of the Statute, and his right, therefore, is not in any degree interfered with by the provisions of the 27th section, upon which the Munsif seems to

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Mahomed Rajeeup
&c.
v.
[illegible]

This being the Lordships' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. Woodroffe upon the effect of the decree in the same 27th Suit under the heading 'accounts,' which relates to what is to be considered an interruption. Nor is it necessary to consider the doctrine laid down in [illegible] in the Court of Exchequer Chamber and afterwards in the House of Lords with reference to [illegible] the English Parliament to [illegible].

The Lordships [illegible] appears to be open to doubt whether the High Court has not given judgment on the [illegible] Suit, which was not before it on appeal, and which was [illegible] the 27th Suit, which was before it. But the Judge says: "I am of opinion that the plaintiff is entitled to the relief prayed for in respect of an infringement of his easement [illegible] Court within two years from the time when [illegible] took place." If the Judge really meant to [illegible] the [illegible] Act, he should have found that the [illegible] was wrong for the obstructions which [illegible] to the [illegible] the plaintiff's mental [illegible] as to which the [illegible] so long as the [illegible] existed, and [illegible] allowed to continue. [illegible] Suit [illegible] express provision [illegible] that effect. [illegible] appears of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and the judgment of the Subordinate Judge as to those obstructions ought to be restored.

[illegible] Mr. Woodroffe has strongly [illegible] the decree [illegible] in favour of the defendants are wrong, and that [illegible] ascertained to [illegible] the judgment [illegible] were not conclusive [illegible] that part of [illegible]. There [illegible], however, here, that [illegible] the Munsif and of the Subordinate Judge to the effect that [illegible]

[illegible] 10 Ad. & E. Sta., S. C. on appeal [illegible]

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Maharaja Ba,roop Kor

Syed Abul Hasson

had a proprietary right [illegible] of the water in the tal and that the plaintiff had [illegible] in the water or it except to so much as flowed out of it as a natural course to the plaintiff's paddy. To that overflow they considered him to be entitled but [illegible]. Their Lordships, therefore, have come to the conclusion that the case being heard upon a special appeal, it is not open to the appellant to impeach those findings upon [illegible] as to this part of the case it is concluded they must [illegible] the appeal. The result is, that their Lordships will humbly recommend to Her Majesty that [illegible] the Decree of the High Court be affirmed, and that the Decree of the Subordinate Judge be [illegible] and that the Decree of the Munsif be modified in accordance therewith.

Mr. Woodroffe [illegible] that the evidence of the Munsif's report [illegible] the measurement of the water in the tal should be confined [illegible] overflowed what was allowed to [illegible] that [illegible] the evidence of the Munsif [illegible] and that [illegible] water. The plaintiff having claimed the whole of the water in the tal, they think that the Munsif [illegible] and that, having given only a qualified enjoyment of the water to the plaintiff, it was necessary in order to arrive at what that qualified right was [illegible]. He has [illegible] that [illegible] would not have [illegible], but would [illegible] nothing be. The Munsif having gone to the spot, and having taken apparently great care with the matter, their Lordships are not disposed to [illegible] with the finding of the Munsif. So that it appears to be established that the defendants are entitled to [illegible] of the water for the purposes of their estate. If this should be wasteful or improvident with reference to the right [illegible] must be the subject of a fresh inquiry. Their Lordships will therefore humbly advise Her Majesty that the decree should

Their Lordships have considered the question of costs. The plaintiff having failed as to part of his appeal they will follow the course which the High Court took and give no costs to either party.

Appeal allowed.

NOTE.

[illegible] that Sec. 28 of the Limitation Act of 1877 which [illegible]

[illegible] however must be noted. In the first place, if the origin of the [illegible] is known, it would rebut the presumption of lawful origin [illegible]

[illegible]

[illegible] lands, Bholanath v. Midnapore Zemindary Co., I. L. R. 31 Cal. [illegible]

WATSON & CO

v.

RAMCHAND DUTT.[1]

[*Reported I. L. R. 18 Cal., 10. I. L. R. 17 Ind. App.*]

[illegible]
[illegible]

The judgment of their Lordships was delivered by

Sir R. Couch.—Gungaram Dutt, Ramchand Dutt and Pedronelson Dutt were brothers and constituted a Hindu family and had an estate. They also carried on business as money lenders.

In the year 1870 Pedronelson executed two deeds of endowment or [illegible] one of the 11th of June, and the other of the 23rd of December. Under [illegible] of those dates the three brothers were entitled to a 12 annas share or twelve annas [illegible] Sookea Mahapore which they had held for [illegible] years. By that [illegible] dated the 5th September 1876 and registered on the 28th of August 1877 the second dated the 3rd August 1876 Ando, corresponding with the 18th March 1876, for a six-annas share and the third dated 14th March 1884 for a two annas share.

The property was subject to the ordinary law of Bengal, according to which upon the death of any one of the brothers the share of the joint property to which at the time of his death he might be entitled, would devolve to his heirs. Padmalochon had died in 1877, at the time of the execution of the deed of the 11th July he had a wife, a daughter Ramsundari Das, one of the appellants, and a grandson, the only son of that daughter. His wife died in his lifetime, between the dates of the two deeds. He himself died on the 26th of October 1881 and upon his will his daughter was his heiress. The Watsons appellants claim through her. It is contended on behalf of the respondents that Pedronelson divested himself of his [illegible] of the 12-annas share held in *patni* by the deeds of endowment executed by him.

[1] [illegible]

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It is not necessary to review the evidence in detail. It was carefully considered by the District Judge. It seems clear that from the time of the execution of the deed of the 15th of July, 1857 until after the death of Padmalochon a period of about three years afterwards, little or no change took place in the accounts, or in the management of or dealing with the business or estates, or the amounts to the credit of Mortgagee were executed, in which Padmalochon joined, everything appears to have gone on in the same manner as if the deeds had never been executed, except that the farm [illegible] was removed from the house belonging to the estate of Padmalochon. No act was done by Padmalochon or her brothers on which she was described as *shebait*.

Their Lordships are entirely agree with the District Judge in his findings of fact and they are [illegible] that the intention of Padmalochon or of the brothers that the deeds should be acted upon or that Padmalochon should thereby invest herself with the property. The deeds were merely fictitious, or *benami*.

In arriving at that conclusion the District Judge [illegible] the District Judge that [illegible] profess to possess [illegible] of Padmalochon or any person acting on [illegible] of the document except [illegible] to Ramanathan or his son Ramchund Nath. They cannot agree with the High Court that the [illegible] that allowance was the exact [illegible] deed purported on the face of it to be, [illegible] related to religious [illegible]

It was very much urged on behalf [illegible] argument of the appeal that [illegible] fathers [illegible] provided for her by the deed was [illegible] that the deeds were not intended to take effect [illegible] Lordships do not attach much importance [illegible] Ramanathan was a widow [illegible] of the houses which formed part of the [illegible] she had apparently no means [illegible] and she was then so far as it appears, living on [illegible] and if she had not at that time [illegible]

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on the face of the deeds was produced by her, she probably would have received nothing.

After the execution of the deeds of endowment, and having the Istamrar of Purnakhoa a certain number of *pattah* of another two annas share of Sikka was granted to Ramchand on a quit-rent of Rs. 1,000.

It having been contended that Purnakhoa did not by the deeds of endowment exceed Rs. 1,000 a year of the joint family property, the *pattah* must be assumed to have been purchased with funds of the joint family, and to have existed for the benefit of the three brothers.

From the facts above stated it appears that at the time of his death Purnakhoa was entitled to a one-third undivided share of a Hamsua or fourteen-annas share of Sikka, of which twelve annas the were held by the three brothers in joint and two annas by her for the support of *pattah*, that the other two brothers were entitled to the other two-thirds thereof, and that the interest of Purnakhoa devolved upon his death to his daughter Ramasundari. Out of her interest in the *pattah*, Ramasundari, on the 8th Assin 1292, after the commencement of the suit, granted a *kabuliat* to Bhuanath Dhur, who on the 5th of November, 1884 granted a *patta* to the Watson defendants.

Their Lordships are of opinion that at the date of suit the interest of the plaintiffs in the last-named two annas was to be deemed their portion of an undivided share of Hamsua or fourteen annas of Sikka that Ramasundari was at that time entitled to the other twelve annas and put them in.

At the time of the death of Purna the Watsons held the Hamsua share which belonged to the three brothers Dutt under leases in respect whereof they paid rent to the Dutt brothers, and which leases expired on 1st Bhadro 1292 Arab, corresponding with the 17th of September 1885. After the expiration of the leases the Watsons who were entitled to the remaining two annas and odd share of Sikka under an ijara from Rani Durga Kumari Debi of the 4th Bysack 1290 Arab corresponding with the 16th of April, 1883, continued in possession of the portion of Sikka which comes under the head of *khas* and to cultivate and sow it with indigo as they had done during the continuance of the leases. Upon the change

[illegible] junction the proper remedy.

[illegible] present [illegible] Watson defendants [illegible] which [illegible] were engaged [illegible] in the cultivation [illegible] and over [illegible] the [illegible]

[illegible] the [illegible] and [illegible] without the consent of [illegible]

[illegible] Watson defendants. The High Court, [illegible] held that the plaintiffs were entitled to the whole [illegible] share.

[illegible] and specifying the [illegible] in the following manner [illegible] right is established to a two-thi[illegible] the plaintiffs are entitled to get [illegible] with defendants No. 1 (that is, the Watsons [illegible] payment of excess court-fees [illegible] amount found due over the valuation of the plaint [illegible]

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shall get two-thirds of a 16 annas share, according to the decree of the 6th June. The first Lower Court finds that no order of injunction be issued to the defendant No. 1, prohibiting them from cutting down or through their sawing indigo on those 4 bighas 1 katha 4 dhurs which indigo is being now grown.'

The High Court affirmed that decree and observed that, instead of a two-thirds share of the crops of the lands of Sirsa the plaintiffs were entitled to get, not possession with the defendants, but Watson & Co.'s share of the said lands when severed. On appeal from the decree of the High Court and varied the amount to be paid by the Defendant Judge.

Their Lordships are of opinion that the judgment and decree of the High Court are correct and ought to be affirmed, with costs, and that the decree of the District Judge ought to be modified and varied. It was contended on the part of the plaintiffs (appellants) that Watson & Co. are entitled to what is termed a certain share, and that the plaintiffs were entitled to a share of the crop but it appears to their Lordships that the plaintiffs have not established a right to have such a decree, and to the extent to which that decree is founded upon that right it ought to be varied. It seems to their Lordships that it must be taken as matter of common and notorious knowledge that indigo is a plant which requires to be raised, and to be manufactured with great care and skill, and to suggest that Watson & Co. could have a proper share of the crop as if it were his separate property is a proposition which cannot be entertained. (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the crops of cultivation of Watson & Co. and the plaintiffs under him of the said part, and Watson & Co. resists such entry and removal. The title between Watson & Co. and the plaintiffs himself is a matter entirely between the landlord and tenant, on the part of Watson & Co. and the plaintiffs. Their Lordships are further of opinion that the decree of the District Judge in favour of Watson & Co. was correct, and ought to be restored. I suggest to them Lordships that in a case like the present no costs should be given on either side. In India a large proportion of the labour on estates is very ill-paid

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per bigha a year for 4,128 bighas, as compensation in respect of the exclusive use and benefit by the defendant No. 1 of 4,128 bighas, from the beginning of the year 1281 to the 4th of January 1880 [illegible] at the rate of the said [illegible] and to affirm the decree of the District Judge so far as it relates to costs.

It may be right to mention, with reference to that portion of the decree above recommended which relates to compensation, that the rate of eight annas per bigha was not disputed by the Watsons upon the facts, and that the High Court were not prepared to dissent from the finding of the District Judge in fixing the area of the *khas* lands at 4,128 *bighas*.

The respondents must pay the costs of this appeal.

Appeal allowed.

Note.

This decision as also the decision of the Judicial Committee in [illegible]

interfere with the enjoyment of the property.

[illegible]

RADHA PROSAD SINGH

BAL KOWAR KOERI.*

[Reported in I. L. R., 17 Calc., 720 F. B.]

The opinion of the Court (Petheram, C.J., Prinsep, Pigot, O'Kinealy and Ameer Ali, JJ.) was delivered by —

Petheram, C.J. This was a second appeal which arose out of a suit brought by the plaintiff to recover a balance of rent at the rate of Rs. [illegible] per annum. The defendant in his pleadings in the settlement of issues stated that he was tenant to the plaintiff of the land in question at a rental of Rs. [illegible] and the Munsif has as the first issue for trial: Is the defendant's rental Rs. 22-2 as alleged by the plaintiff or Rs. [illegible] as alleged by the defendant? And the questions which arise in the second appeal are: Was the plaintiff entitled [illegible]? Both the Munsif and the District Judge have decided the case against on appeal to the first instance have found as a fact that the defendant's rental was Rs. 18-10-0. The case has been brought before the High Court on second appeal, and the plaintiff contends, first, that there was no evidence on which the Munsif and the District Judge could come to the finding that even if there was some evidence the Judge's judgment shows that he has misconstrued the plaintiff's case and has misapplied the law that he is entitled as he is prayed in the Court of second appeal and [illegible] the rent is found to be Rs. 18-10-0 the plaintiff is entitled to recover the larger sum of Rs. [illegible] by reason of terms which are [illegible] and [illegible] the evidence shows the defendant agreed to pay as rent [illegible] the remedy upon for the occupation of the plaintiff's land.

To discover whether these contentions are well founded it is necessary to see what was the evidence which was given in the case. The suit, both before the Munsif and the District Judge was [illegible] and [illegible] and they are [illegible] in the same position.

The plaintiff, in order to prove that the rent was Rs. 22-2 called the defendant himself, and also [illegible]

* Appeal from Appellate Decree No. [illegible] of 1886, against the decree of Babu [illegible], Subordinate Judge of Patna, dated the 30th of [illegible], affirming the decree of Babu [illegible], Munsif of [illegible], dated the 30th of [illegible].

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to produce his receipts for rent for the years 1286 to 1292, and because the defendant did not produce the receipts and secondary evidence of their contents was given by the plaintiff, who produced the corresponding counterfoils which were in the following form :—

No. D. A. 0078

Dumroon Raj

"No. 2 ... ... Re. 1 (one rupee).

Date 25th Kuar 1286

Moh't Noor Kashikar Defaulter of Rano Bara, through self in account of settlement of details of Mouzah Rano Bara, Pergunnah Bhojepore.

"Out of the rent of the year 1286 Re. 1 (one rupee)

Received one rupee.

(Sd.) Adinath Rai,
Tehsildar.

By his own pen.

(Sd.) Dho Narain Lal Patwari."

"I have carefully examined that in several of the years from 1286 to 1292 the defendant had paid the exact sum of Rs. 12-2 and that the yearly payments had always been within a few pice of that sum.

The plaintiff also put in his [illegible] for the same years which were in the following form :—

[illegible] Jamabandi [illegible] Mouza Rano Bara for the year 1286

Serial number	Name of tenant	[illegible]	[illegible]	Total quantity of land	[illegible]	[illegible]	[illegible]	Total Rupees	Rental [illegible]	[illegible]	[illegible]	Remarks	Remarks	Remarks	Remarks
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible] Koer	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

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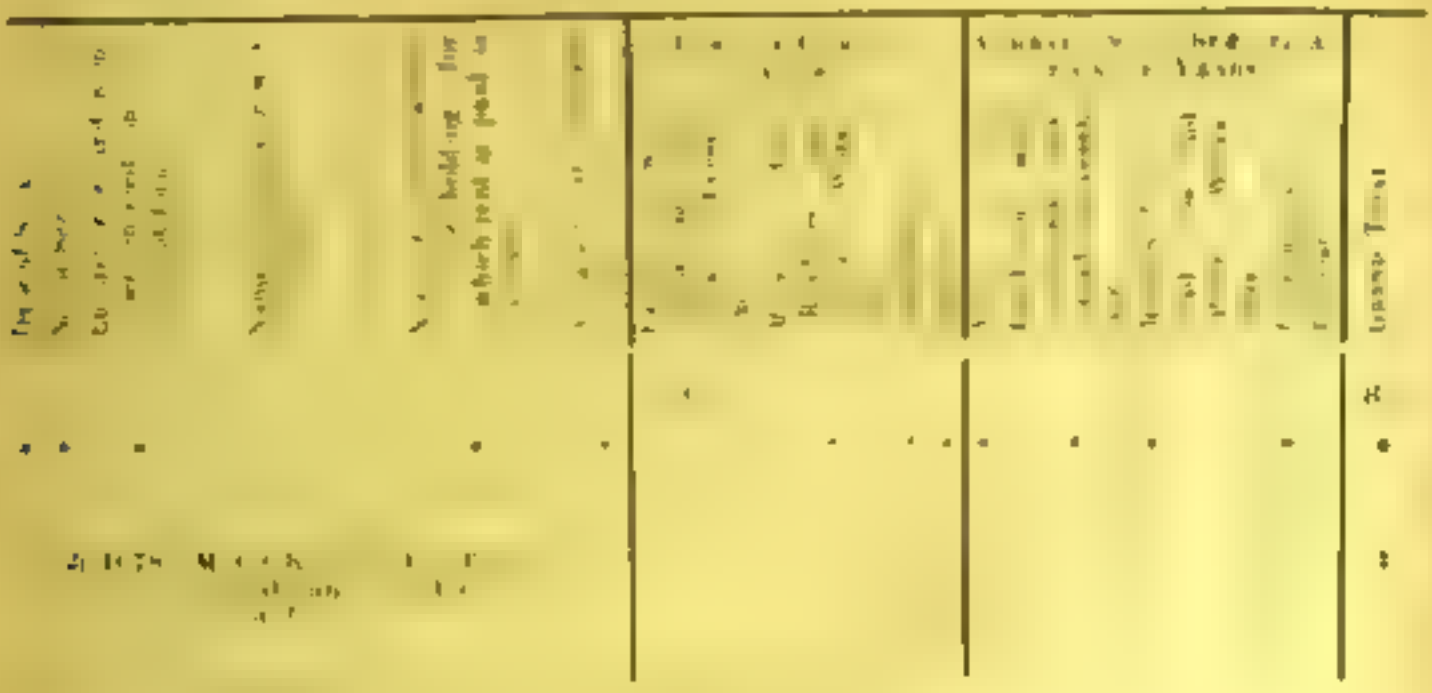
The defendant in his evidence said :—

I am defendant no. 1 [illegible] I know that [illegible] *Khanda* [illegible] I have been paying Rs. [illegible] I do not claim to the [illegible] I do not recollect if I have paid all the [illegible] separately from [illegible] I do not know if receipts were asked for. Receipts are not preserved. I do not remember from whom [illegible] and *chauth* have been collected.

The [illegible] on the [illegible] appeared that [illegible]

DUMRAON RAJ

Hon [illegible] *Prasad Singh* [illegible] *Privy Council* [illegible] *the Court* [illegible] *Rai Kanhaiya Lal* [illegible] *Rai Kanhaiya Lal* [illegible]



( ) see its original

The plaintiff called [illegible] whom said that in the *Zemindars* accounts of certain years *kattha* [illegible] were entered [illegible] separate [illegible] In

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defendant filed as the best evidence of the plaintiff's *zamabandi* for 1279 which was in the following form:—

1279.

Mouzah Jowan Rajar Pergunnah Jowan Pergunnah Mahar-rar Jowan Pymas Sarkar Jahanabad [illegible] *account of adhiwasi tenants.*

Name of Tenant	Quantity of land	Rent	Cess	Batta	Poten	Total charges	Total
Mohor Koeri							

Rice Cash Rent [illegible] Rent Rent Rent [illegible]

(1)

Koeri ₹ 13 0 14 4 4 14 18 [illegible] 14 8 18 31 7 0

Bahara 1 18 14 2 9 1 4 [illegible]

4 10 14 [illegible]

(1) So.

Upon the evidence the Munsif found as a fact that the defendant's payment was Rs. 18 10 6. He considered that the statements filed by the plaintiff were fabricated, that the receipt filed by him merely showed the amount paid on a day but gave no clue as to the whole of the money paid by the defendant was on account of rent or not, and that the *zamabandi* for 1280, together with the [illegible] showed that the difference between Rs. 18 10 6 and Rs. [illegible] was not rent at all, but was made up of various [illegible] charges and he accordingly found the last sum in favour of the defendant. When the matter came before the District Judge on appeal, he entered into hearing of the Munsif. And the last question which has been argued before us has been whether there was evidence on the record to support this finding. I think there is. The defendant himself stated that his rent was Rs. 18 10 6. The *zamabandi* of 1280 indicated that at that time the rent was Rs. 18 10 6, and the [illegible] for the subsequent years indented

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that even if it be assumed that the form of the [illegible] and been changed since that time the fact still remained that the sum of Rs. 22-2 claimed by the plaintiff was made up of the rent with other charges added to it and whether they were evidence for the plaintiff or not it was certainly evidence against him. The second question then arose and the plaintiff contended that if there was no evidence on the record that the rent was the amount [illegible] from his judgment that the Subordinate Judge was entirely misunderstood the case that his finding of fact was [illegible] on record appeal. In the fifth paragraph of his judgment he says:—

'The plaintiff will not tell us the exact nature of the consolidation', but at last gives us about 4 lines. These modern consolidations cannot, as you [illegible] rules, be made by the *ryot* alone. He must secure the acquiescence of the tenants concerned. There has therefore been no 'consolidation' as alleged."

And Mr Woodroffe, on behalf of the plaintiff says that it is apparent that the Judge thought that the plaintiff in order to succeed, must prove a consolidation of the rent and other items by some particular agreement come to between the parties at some specified time, that with this order would be compelled the plaintiff's pleader to mention some time, and that when he mentioned "about 1286," assumed that the plaintiff's contention was that the consolidation was effected by the change of the form of the *jamabandi* and that as that was the act [illegible] had alone, it would not bind the tenant, whereas the plaintiff's case was that the form of the *jamabandi* document proved that the rent has always been the larger sum and that the other figures merely show the manner of calculation by which the rents was originally arrived at.

If this was the view of the Judge as to what the plaintiff's real case was, I cannot say that it was wrong. The [illegible] of 1286 shows that the Rs. 22-2 was made up of the rent and various other items, and the evidence for the subordinate which, as I have before said, was certainly evidence against the plaintiff, show to my mind that the Rs. 22-2 was considered something other than rent, though they do not show what it was. These documents, in my opinion, relate to [illegible] of

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for which rent or a part of it was due from the receipts, that is rent which has been enhanced under the provisions of Act XII of 1881, of which fact the receipts for those years are conclusive evidence by section 3 of the Bengal Tenancy Act, and it was exclusively contended that the charge on the zamindari was one of fixed rent, representing a definite agreement between the parties and payable by the landlord was the question as to excepting the other items from the rent which would not be except by agreement with the tenant.

I agree, then, with the Munsif and the District Judge that the rental was Rs. [illegible] that the difference between that amount and Rs. [illegible] payable out of the lands mentioned in the plaint of 1886 and upon [illegible] the third portion of which is the question upon which the case of *Parbati Nath Sahu v. Jairam Nath Sahu* appealed to the attorney [illegible] is to be considered is that of *Chaitan Mahton v. Tilakdhari Singh* [1]

The case of *Nanku Mal v. Jowahir Singh* [2] was decided in January 1887, before the passing of the Bengal Tenancy Act. The suit was by *zamindars* to recover from a raiyat Rs. [illegible] as arrears of enhanced rent for the years 1880 to 1885, together with certain cesses and sums. The nature of the records appears at the opening of the case to have been such as to create the belief that the amount payable on account of the enhancement of the rent of the land which the defendant was [illegible]. It was found as a fact that according to the custom of the estate of which the defendant's land formed a part those items had been paid by the defendant and his ancestors for many years, and it appeared that they were not uncertain in amount, but were always a part the amount of those each year, being merely a matter of calculation. Mr Justice Mitter at page 187, says as to this:—

"It has been contended that although the disputed items in the plaintiff's claim are described in the plaint as cesses and not as rent, also they are designated as [illegible] in the plaint and distinct from the specified rent, yet they are not cesses but part of the rent. This contention is based upon the ground that any thing which

[1] I. L. R., 15 Calc., 633.

[2] I. L. R., 11 Calc., 179.

[illegible] the [illegible] Regulation [illegible]

[illegible] *abundo.*

[illegible] the full [illegible] and [illegible] the [illegible] of the other [illegible] whether [illegible] or [illegible] not being [illegible]

[illegible] appeal. The judgment of the High Court was affirmed. Lord Macnaghten in delivering judgment on appeal of the [illegible] says:—

"[illegible] this [illegible] [illegible] long [illegible] appear. The [illegible] recording [illegible] they were [illegible] Permanent Settlement [illegible] Sir Thomas Guy [illegible] Regulation VIII [illegible] 61 of that Regulation. It [illegible] of the Permanent Settlement [illegible] decrease of [illegible] that same illegal."

By this judgment I understand [illegible] affirming that of the High Court, [illegible] that under the Regulations [illegible] occupation of land, except one who [illegible] long which was [illegible]

[illegible]

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by agreement or by some judicial determination between the parties, and that any contract, whether express or implied, to pay any thing beyond that sum under any name whatever, for or in respect of the occupation of the land, could not be enforced.

After the decision by the High Court of the case which I have now considered but before the decision by the Privy Council, the present Bengal Tenancy Act (VIII of 1885) came into force. The sections of that Act which are material to consider are sections 3 (8) by which rent is defined to be "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant," and section 74 which enacts that all impositions upon tenants under the denomination of *abwab* (cesses) or other like appellations, in addition to the actual rent shall be illegal, and all stipulations and reservations for the payment of such shall be void." After this Act had been passed but before the decision of the Privy Council, the case of *Poresh Nund Sirkar* v *Ray Nath Singh*[1] was decided by a Division Bench of the Court. In that case the plaintiffs sued to recover Rs. 2,830 13 3 for arrears of rent and for *tehsildari* and *sehsari* due to them for the years 1290 to Baisakh 1293 in respect of a number of tenures held under them by the defendant. The basis of the suit was a *kabuliyat*, dated 25th December, 1875, by which the defendant agreed to pay a certain fixed rent for a certain area of land for items designated therein as *tehsildari*, *sehsari* and others, in respect of which items the amounts bargained to be payable were Rs. 9 and Rs. 2, respectively. The only question was whether the *tehsildari* and *sehsari* could be recovered. The learned Judges held that as the items in dispute were of arbitrary and uncertain amounts, but were cesses which the tenants had agreed to pay in addition, they were no fair part of the rent agreed to be paid and were not *abwabs* at all. They considered that what were and were not *abwabs* must depend on the circumstances of each particular case in which the question arises, and they allowed the plaintiff's claim. It is clear that this case can be reconciled to the judgment of the High Court in the other case, as Mr Justice Mitter expressly says

[1] I. L. R., 10 Calc., 828.

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that the question whether the disputed item was a cess must be decided by the Court in each case; but if I have correctly understood the judgment of the Privy Council in the same case, it is equally clear that it cannot be regarded as such, as that decided that nothing can be recovered from the tenant except the one sum fixed as the rent of the land and in this view, I think, we must hold the case of *Jagan Nath Singh* v. *Hari Nath Singh*[1] to be overruled by the decision of the Privy Council in that of *Chattar Mahton* v. *Lachhmi Narain*[2] and that unless the law has been changed by the Bengal Tenancy Act in favour of the landlord, the sums claimed in this action cannot be recovered, as they have been proved to be something beyond the sum which had been agreed upon as rent. The definition of rent in section 3 of the Act was not, in my opinion, affected by the question as that would have been the correct definition of rent without the assistance of the Act, and consequently was so at the time of the decision of the Privy Council, and the only question is as to the meaning of section 74. I think that the effect of that section is to declare the law to be as it is laid down by the Privy Council in the judgment which I have cited, and it is to the effect that no sum whatever shall be recovered from the tenant for or in respect of the occupation by him of the land beyond the sum which has been fixed for rent, whether the sum has been fixed by agreement or by judicial determination between the landlord and the tenant.

In my opinion the portions of the cesses which are claimed to be illegal, and cannot be recovered as rent, the second appeal should be dismissed with costs.

O'KINEALY, J.—In this case the plaintiff, a zamindar, and the defendant his ryot for arrears of rent due on account of the years 1290 to 1294. The plaintiff alleges that the rent was Rs. 22-2 per annum. The defendant on the other hand contends that it was only Rs. 18-10-8, and that he had paid that sum. He also added that the difference between Rs. 18-10-8 and Rs. 22-2, claimed by the plaintiff consisted of several cesses which has been incorporated with the original rent.

In the first Court the plaintiff's claim was decreed in full, and the defendant appealed, and the lower appellate Court

[1] I. L. R. 16 Calc., 828. [2] I. L. R. 17 Calc., 131; L. R. 16 I. A. 152.

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jamabandis, or collection [illegible] from 1286 to 1292 were also produced as corroborative evidence.

He found that the [illegible] from 1286 to 1292 had been fabricated in order to support a false case. He has also held that the amount claimed as rent included *cesses*, such as *abwab*, *dharai*, [illegible] and *sayar*. He found that the proper rent was what the defendant alleged it to be, and on that basis he [illegible] the suit to be false.

The plaintiff appealed to the lower Appellate Court. He argued that the Munsif should have found whether the amounts claimed to be realised as [illegible] were [illegible] by the lower Court, were legal cesses or not. It was urged that the onus of proving that dues or taxes were unlawful in the first instance, was on the defendant. He further asserted that the Munsif was wrong in saying that the *qabuliat* produced on the part of the plaintiff was not genuine, and asserted that the plaintiff's claim was proved by the statements of the defendant and the papers filed by him. These contentions seem to have failed before the Judge in the lower Court. He came to the conclusion in regard to the *qabuliat* as the Munsif had done, with but little reasoning, but Judge in thinking that the sum stated by the defendant was the *asal jama*, while the amount claimed by the plaintiff as the yearly rent was made up of the several illegal cesses, such as *abwab*, *sayar*, and *batta*.

This being the case and it not being [illegible] for rent he refused to grant the [illegible] rent decree, as he [illegible] was not rent and the plaintiff might not be successful in a [illegible] title. He therefore dismissed the appeal.

From that decision a second appeal was preferred to this Court, and before the present Bench it was contended on behalf of the plaintiff that the facts not having for many years past the rent claimed was taken receipts and the amounts paid had been rent without any specified [illegible] the defendant [illegible] and [illegible] he was bound to pay rent at that rate, and the Court below ought to have held that the plaintiff had proved only a [illegible] of them [illegible] with the rent, by an [illegible] of the defendant to pay the whole amount as rent.

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So far as I can see there is not a single ground of second appeal in the case of [illegible] their Lordships of the Privy Council say:—

"The case was before the High Court upon Special Appeal and therefore on strictness, they had nothing to do with the evidence on the case."

In the case of [illegible] on the 20th June, 1888, there is the following passage:

"[illegible] the Judges of the High Court in hearing the appeal had regard to the provision in the Code of Civil Procedure Act XIV of 1882, section 584 as to appeals from appellate decrees and consider how far it [illegible] the power of the Judges of the District Judge's decree [illegible] on their judgment proceeds on the latter part of sect. 584 the Court, when [illegible] that the Legislature in the power of the Court to entertain and hear a second appeal ought to be allowed to [illegible] the appellate Court ought not to be allowed to question the finding of the first appellate Court upon a matter of fact."

In this case two Courts have come to [illegible] on a matter of fact which [illegible] of the case namely, what was the rental of the defendant [illegible] and they have accepted the [illegible] I see no reason to [illegible] the case [illegible] to entertain the second appeal in favour of the appellant.

In the view of the case [illegible] Court I should answer the question referred to this Court in the negative, viz., whether the provisions of the Code [illegible] to certain grades the [illegible] or whether they [illegible] illegal cases or matters that may [illegible] by reason of their having been [illegible] and without any question as to the [illegible] Judge or the Court below [illegible] a decree on the matter of [illegible] Judges composing the Full Bench think that it should be answered, I think it is better to give my opinion.

[illegible]

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Rai Rowan Koer

In order to determine what was the meaning of rent under old Regulations, and what were the cesses and assessments that they were intended to prohibit, it is necessary to see what the law was before the time of the Permanent Settlement, what the evils were that the Legislature then intended to get rid of and how they attempted to do it.

Before the acquisition of Behar by the East India Company, the distinction between rent and revenue can hardly be said to have existed. Both were looked upon as the dues of Government, rather in the form of a tax on land than as rent. Thus in Regulation XLIX of 1793,* we find it declared that, according to the established usages of the country—and these according to 24 Geo. III (1784), chapter 25, section 39, were to guide the Directors in fixing the income of Government from land—these dues consisted of a certain proportion of the annual produce of every *beegha* of land cultivable, according to the local custom, either in money or kind. This right was a right peculiar to the state alone. So that as long as the Mogul Government was strong enough to govern the provinces, taxation, so far as it fell upon land, may be said to have been substantially of a fixed nature. In Behar the *Zemindar* landed the produce of the lands with the cultivators in stated proportions; and in Bengal a settlement was made with the ryots upon a standard called the *asul*, or original rate, with the accumulations of taxes successively imposed upon it. These taxes were divided into *abwab* and *mathut*, and in calculating the *Zemindary* demand, now called rent, the *Zemindar* levied the *asul* or ground rent according to the *pergunnah* cowle rent, of each village, and the excess imposed by them, according to the rate of the *pergunnah*, and all extra according to the rate of each *mokuddum*. These two names the *asul* and *abwab* constituted the whole land revenue demand imposed on the ryot prior to and after the British rule. To illustrate this I quote from Mr Shore's Minute the following abstract of a ryot's account taken about the year 1781:—

	Rs. An. G. K
Rent of 7 beghas 12 cottahs 7 chittacks of land of various produce, calculated at a certain rate per bigha according to its produce	11 0 8 0

* Preamble.

* Fifth Report, Vol I, p. 162.

1880.

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Abwab cesses.

	Rs.	As.	G.	Rs. As. G. K
Chauth at 9-16 per rupee ..	2	10	0	
Pathauti, a half mo. demand or 1-8 of the *jama*		7	2	
Nazarana, 1 mo. or 1	1	[illegible]		
Hasanat 1 mo.	[illegible]			
Rasadari, 3-4 of 1 mo. amount or 1-16	[illegible]		11	
Company's [illegible]	[illegible]		7	
Batta, 1 anna per rupee	[illegible]		11	
				8 12 2 0
	[illegible]			21 12 10 2
Abwab 1 anna per rupee				[illegible]
Total [illegible]				21 14 12 0

As I have stated above [illegible] the right [illegible] ment when in full vigour, supervised the assessment [illegible] years. *Abwabs* were in their nature unconstitutional [illegible] the beginning of the 18th century when the [illegible] becoming more independent, they began to levy new perpetual imposts now called *abwabs*. These several imposts were levied by the [illegible] or standard [illegible] and the *Zemindars* who paid over authorized [illegible] their *asal* or standard of assessment and [illegible] were incorporated with [illegible] became a new rate or standard of assessment [illegible] when the assessments [illegible]

Besides being unauthorized [illegible] these assessments namely, but [illegible] within the *asal* or the extent [illegible] their amount to an arbitrary [illegible] *ankahda*. The result was that [illegible] in some instances amounted [illegible] *Zemindar's abwabs* amounted to somewhere about 50 per cent

1900

Radha Prasad Singh v. Dal Kuar

Moreover, in some cases the shares were increased in one estate to meet a deficiency in another, while the incidence of the taxation varied as different estates were called upon according to the caste and place of residence of the ryot.

They were also made a means of enhancing the rent, which was one of the objects of Government to stop enhancements made in an arbitrary and capricious manner.

The mode in which these shares grew up is well described by Mr. Shore in reference to the rent-account printed above. He says, in 1789:—

"If the accounts of the country had been now examined some additional imposts would appear. The *Zemindars* introduced them by degrees at different times, three, four or ten years, and gave different names for the several years successively. Solicitation and influence are equally employed to effect the establishment of them, and a ryot who has the hardihood to refuse a heavy will rather submit to that than a step. Imposts evidently can only be practised at one time but a permanent exaction of this nature can rarely be established by force at once, or to any

It is I think in this sense that these shares are said in the Regulations of 1793 to be arbitrary or unlawful. They are found there described by the epithets of that period as arbitrary impositions, crimes in mode and principle, yet extorting moderate amount as "claimed by no measured rule, but solely at the caprice of the Zemindar" and as having "encroachments on the rights, prerogative of the Sovereign, as levying from the subject what can only be legally exacted from him for the purposes of a necessary exercise of the State."

How to me I think the sense in which these shares were considered as arbitrary or unlawful in the old Regulations was arbitrary in the sense that they were not authorised by law—certainly in the case that though levied at a certain proportion of the gross assessment of the land tax, there was no obligation by the Zemindar in taking the proportion they have to the produce of the land nor any rule prescribed for limiting their amount.

[1] Fifth Report, Vol. I. p. 162.

Rent-free tenure

Its Kinds and Origin

They were not arbitrary in the sense that the amounts had not contracted or agreed upon for a short time and could not be paid or withdrawn, but as a land tax as the Government share and according to the established amount, whatever it was, as in the present case a Determined sum, generally a certain definite share of the real land tax

In 1772 the Collector Court of Directors Nawab Mahomed Reza Khan his appointment of Naib Diwan and Intendant to attend both conjointly however to the execution of Diwan and to the performance of the duties of Mir of that office that had been vested for the settlement and collection of the revenue

Rule 10 states —

That the farmer shall not receive any perquisite from the ryots than the stipulated amount and that he shall not forbear whatever, and that the excess collected from the farmer on account shall be compelled to make restitution which he shall have taken from the ryots because a penalty equal to the same amount to the Nizamat and to be imposed on the farmer - lease shall be annulled "

Rule 12 states —

That no [illegible] shall be taken under the name of [illegible] upon the ryots and that the articles of [illegible] which are at the establishment shall be exacted at the [illegible] of the Government of these are [illegible] their nature to be oppressive and pernicious-

Two rules were issued these days after the assumption of the Diwani and thus the [illegible] almost the first act of British Government in the revenue administration of Bengal

The next item to be [illegible] from the [illegible] in which this was discussed [illegible] Behar, in which he said a [illegible] with [illegible] share of the crop given as a fee or perquisite to the [illegible] the village; and zeal was an impost in order [illegible]

Colebrooke's Supplement, pp 10 Fifth Report Vol I & Ibi Appendix Vol II, 12

1790

Duties Abolished

But Not the Rents

interest which the zamindars were compelled to pay on arrears of revenue but what the rules generally permitted. That whether it be treated as an assessment or a tax, nothing beyond the ordinary rent was to be allowed.

In 1787 the law relating to the assessment of revenue in Bengal was revised by Regulation VIII passed on the 8th of June of that year.[1] Section 51 runs as follows:

"And whereas notwithstanding the orders of Government in the year 1772, prohibiting the imposition of *abwab* or assessment under the names of *mathut, hasbulhookm, mahtarfut* or any other new articles of income or various names have been introduced the Collector is strictly enjoined to enforce the orders and prevent the imposition of any new taxes upon the ryots and if hereafter any new tax should be imposed, the Collector, on proof of such exaction, is to direct double the amount thereof to be restored."

In this section it will be seen that the Legislature brands these imposts as assessments and taxes and gives a low estimate of their amount as well as of the penalty to be inflicted by the Regulation of 17[illegible].

This brings us down to the Regulation relative to the Permanent Settlement which was subsequently promulgated in 1793 when the Permanent Settlement was introduced. By section 27 of Regulation VIII of 1793 it was enacted that:—

"The rents to be paid by the ryots by whatever rule or custom they may be regulated, shall be fixed at such a rate in the [illegible] which in every possible case shall prevent the exaction from them of more than the established amount to be paid by them."

By section 8 of Regulation IX of 1793 it was declared:—

"If a dispute shall arise between the ryots and the persons from whom they may be entitled to demand pottahs, regarding the rates of the pottahs whether the rent be payable in money or kind, it shall be determined by the Dewanny Adawlut of the District in which the lands may be situated according to the rates established in the pergunnah or districts of the same description and quality as those respecting which the dispute may arise."

[1] Colebrooke's Supplement to Cases Heard in Supreme Court, Vol. I, p. 12 in Harrington's Analysis, Vol. II, 53

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So that the Permanent Settlement and the Regulation of 1793 describe as rent the annual gross rent assessed according to the [illegible] rupees per [illegible] and that annual gross rent is the basis for the assessments of taxes which have no reference to the actual rent or to the extent or produce of the lands by the fact that the [illegible] of them was not entered in what is called the [illegible] or shamilat by reason of any change in the customary rent or to the extent or the amount of [illegible] of the same. Bearing this in mind we can now understand the meaning of sections 54, 55 and 56 of the Permanent Settlement.

Section 54 of Regulation VIII [illegible]

The [illegible] *khuds*, [illegible], and other [illegible], from those number and [illegible] having been [illegible], and a scheme of [illegible] to the [illegible] all [illegible] of land [illegible] to assess [illegible] and [illegible] the whole with the [illegible] specified.

Section 55 of the Regulation enacts—

"No actual proprietor of land or dependent talukdar or farmer of land, of whatever description, [illegible] *abwab* or *mahsul* upon the ryots, under [illegible]."

Now the effect of these enactments is [illegible] from the Permanent Settlement there was [illegible] was believed to be a [illegible] assessment of rent by law, which was [illegible] and that in addition to that there were [illegible] to taxes or cesses [illegible] which [illegible] prohibited for [illegible] and that there was [illegible] thereafter by imposing each *Zemindar* to revise the assessments of taxes then existing [illegible] and consolidate them into one specific sum which was [illegible] and to absolutely prohibit [illegible] in addition to the [illegible] *Ghulam Nabby Chowdhry*.[1] A certain time was given for the consolidation and [illegible], it was directed that a return for the [illegible] rent should be made [illegible]

[illegible]

1902.

Rodon Pleasants

Bell & Wallace

We can now easily understand the meaning of the *husbands* of 1 Dan. 1 Ch. 1 which is relied on by the defendant in the present case.

Name of tenant							Date

After the name of the tenant comes the "Then the ground rent called "*Ingress*." Then comes "*Herriot*," a due in [illegible] "a tax imposed to make [illegible] [illegible] which has always been [illegible] [illegible] Regulation [illegible] Section 3, clause 6. No question as to *fealty*, arises [illegible] "[illegible] *paterari's esq*," a cess imposed for the [illegible] the person and declared to be an *abuse* by the [illegible] [illegible] Lastly the column "Ordinary expenses" [illegible] *Remedies* expended.

In accordance with the common law, and in pursuance of [illegible] VIII [illegible] the [illegible] was determined [illegible] [illegible] but [illegible] the [illegible] of any of the other [illegible] [illegible] and [illegible] with the [illegible] of the rent be such that they are calculated upon the ground rent. There is no means known to the [illegible] [illegible] the [illegible] they could bear to the rent.

[illegible] which I have already [illegible] that [illegible] ground rent [illegible] with the meaning of the Permanent [illegible] Regulation and the [illegible] of any of it was [illegible] [illegible] with a [illegible] of three to one the amount.

[illegible] *settlement* [illegible] at the time of the Permanent Settlement was about to expire. By section 53 of

[illegible] R. B. A., 1868, p. 699.
[illegible] I. L. R., 11 Calc. 370.

Regulation VIII of [illegible] been approved [illegible] by the [illegible] or the [illegible] C[illegible] of the district. These restrictions as to form were partially removed by Regulation IV of 1794.

Towards 1812 [illegible] the Government and [illegible] legislation [illegible] Mr. C[illegible] I put them in his own words. He said:—

"As [illegible] part [illegible] appears to [illegible] the [illegible] form of leases, and [illegible] be drawn [illegible] regulations [illegible] Permanent Settlement [illegible] land revenues of Bengal [illegible] in this province of imposing on their ryots [illegible] *abwabs* [illegible] in the *pattahs*, [illegible] imposed on the [illegible] authority [illegible] the leases of their [illegible] such arbitrary exactions, which had [illegible] oppression and of gross abuses, the regulations [illegible] Permanent Settlement provided that no new *abwab* [illegible] any pretence [illegible] in the [illegible] should [illegible] in the [illegible] *pattahs* of any other form are to be held invalid. Notwithstanding this penalty, which was expected [illegible] compliance by rendering [illegible] and tenant [illegible] the prescribed form, [illegible] has been [illegible] ample and [illegible] But whether [illegible] ineffectual [illegible] There is no longer [illegible] holders and tenantry [illegible]

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prescribing to them the manner and form of their reciprocal engagements. They may be safely left to protect their mutual interests by entering into such engagements as they may consider to be for their benefit respectively, and to render their agreements in writing in any form most intelligible and satisfactory to themselves or their [illegible] most binding and secure. All that need be required is that the engagements shall be definite, and it may be necessary to guard against any clause of a lease or other engagement reserving the power of imposing cesses or taxes termed *abwab* or *mathut*, or under any other denomination whatsoever, or binding the *patnidar* holder to pay any augmat or addition whatsoever beyond the rent however regulated, or [illegible] kind, which the *patnidar* or engagement-holder shall be void and of no effect and the Courts would not return to summonses, decrees, and enforce payment of such cesses and exactions as unspecifically stipulated and agreed to by the *patnidar* or other engagement. Under the circumstances of the present case, the Courts of Justice will give effect to the engagements of the parties according to their exact terms with such exceptions only as stipulations subversive of the nature of tenure or arbitrary demands at the will of the other. The exception together with the provision actually in force regarding [illegible] any arbitrary cesses or *abwabs* under whatever pretence will certainly prevent the removal of [illegible] and abuses which the Regulations I have proposed to modify were designed to prevent."

For these reasons Regulation V of 1812 was enacted and of it sections 2 and 3 ran as follow:

"Section 2. Section 2, Regulation VIII [illegible] section 2 Regulation L. 1793 and section 2 Regulation XLVII, 1803, by which the proprietors of land paying revenue to Government are precluded from granting leases for a period exceeding ten years are hereby repealed, and proprietors of land are hereby empowered to grant leases for any period which they may deem most convenient to themselves and tenants shall consent to the engagement of their estates.

"Section 3. Such parts of Regulation VIII of 1793 and of Regulation IX of 1793 as require that the proprietors of land shall prepare a *jamabandi* and that such *jamabandi* shall be

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avised by the Collector, was to secure that arrears for a short period (not more than that provided by the Regulations in question, viz., three years) should be punctually realized and the proceeds of each annual assessment be considered adequate to meet cases of less expedient talookdars whose defaults are rife, and to secure corresponding [illegible] of the [illegible] of such of these classes, or any other classes to which it was found from [illegible] the following portion was not [illegible] and most undesirable to their respective estates to proceed. It was clear that nothing was contained in the Regulations to negative the supposition that [illegible] under the circumstances of [illegible] and [illegible] sanction. A stipulation [illegible] that rents [illegible] by the Collector [illegible] shall not otherwise affect the rights of classes of the [illegible] beyond the period, or, in other words, that [illegible] were to have been specially [illegible] by the Collector.

Apparently [illegible] as to the meaning of section 2 since this was enacted in Regulation XVIII of 1824 the first Section of the amending Act declared the true meaning was that permission [illegible] was [illegible] for any period exceeding [illegible] which he might deem reasonable [illegible] a proceeding [illegible] interest could not [illegible] extend beyond the term of his own interest.

This was the [illegible] regard to rent and *abwabs* which remained in force until the passing of Act X of 1859. The avowed object [illegible] Regulation V [illegible] was to get rid of the necessity of [illegible] by the Collector, but at the same time [illegible] prohibition already existing in Regulation VIII [illegible] holders [illegible] or [illegible] from [illegible] them the time [illegible] the Permanent Settlement had passed, and they could not be reassessed [illegible] but only in [illegible] which they had been [illegible] with land. [illegible] was considered would leave the matter [illegible] as he was after the passing [illegible] Regulation VIII [illegible] By section 2

[illegible]

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of Regulation VIII of 1793 the proprietors were empowered to grant leases of any tenure for a period not exceeding that of Regulation V of 1812 they were empowered to receive from the tenants "corresponding engagements for the payment of rent" and of course. No further power was given. The law (to mark the distinction between cases and rent to former it is referred to as paid under stipulations or covenants the latter under engagements) it was the engagement for the payment of rent, and not the stipulations for cesses, that was to be enforced. It was not the object of the framers of the Regulations to allow the patta to contain any thing in money or in kind not then known as rent, and when they describe *abwabs* and *mahsúls* as arbitrary or customary they were only using words which had been construed from 1772. Having thus in mind a comparison of the latter portion of the section with section 3 and 5 of Regulation VIII of 1793, we find that the words "customary abwab" in Regulation V of 1812 are the same as "customary dues" in section 5, and refer to the cesses specified in section 3 as to be paid by settlement. They have no reference to cesses. Hence the view taken by the Full Bench, in [illegible] where it is said that the last four lines of section 9 of Regulation V of 1812 refer to the general terms of the Permanent Settlement, that being so I take it that every assessment of new kind beyond that entered in the second column of the [illegible] given above, was an arbitrary or customary one within the Regulation, and prohibited by it.

These sections are partially repealed by Act X of 1859 and Act VIII of 1869 and are now wholly repealed by the Bengal Tenancy Act (1885) but are re-enacted by section 71 of that Act, which declares:—

"A proprietor or patnidar cannot make the payment of *abwab* or *mahsul* or other like appropriations or additions to the actual rent due be illegal and all stipulations and reservations for the payment of such shall be void."

It seems, therefore, that all additions to the actual rent under the denomination of cesses are now, as they were in 1793 illegal and any agreement to pay them is void. The

* 3 C. L. R. 12 Calc. 175

[illegible] Bench in the [illegible] affirmed by their Lordships of the Privy Council.

It has been [illegible] interpretation has been [illegible] in the case of [illegible]. In that case the plaintiff [illegible] enumerated [illegible] and [illegible] for the different items were set out [illegible]

1. [illegible] plaintiffs [illegible] proprietors and [illegible] Kharagpur [illegible] paid [illegible] the [illegible] plaintiffs [illegible] road cess, public works cess, *tahowri*, etc.

2. [illegible] rent, road cess, public works cess [illegible], etc. [illegible] * * * is due from the defendant.

For the year 1290.

	Rs.	A.	P.
[illegible]	[illegible]	[illegible]	[illegible]
Road and public works cesses	[illegible]	[illegible]	[illegible]
T[illegible]	7	[illegible]	0
Dakbehri	[illegible]	0	0
Salami	[illegible]	[illegible]	[illegible]
Interest	[illegible]	[illegible]	0
	[illegible]		

The Judge in the lower appellate Court [illegible]. He found that *salami* was a tax levied [illegible] the occurrence of the [illegible] Zemindar [illegible] these [illegible] decided the [illegible] and

* I. L. R. 15 Calc., [illegible]

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we know that a general rule of the Regulations is to [illegible] and in the case of rent as opposed to cesses which was styled an *abwab*. Thus in Regulation LI of 1795, section 2, clause 1, we find the words *mal* and *mal-guzari* used in this sense. In short, the Judge found that were cesses, independent of the [illegible] and were payable when certain ceremonies were performed. In appeal to this Court, the Division Bench decided that the items called *dakoti*, and *salami* did form part of the rent and were covenants because they were entered in the [illegible] and which the defendant held were not a bar to any suit or part thereof which the tenant agreed to pay, and they decided that the Full Bench decision referred to did not show us to any that anything recoverable as rent could not be recovered at the present day. I agree so far as to say that the Full Bench did not lay down any such proposition, but I think that the Full Bench decision has been that these amounts were not recoverable under Regulation V of 1812. In that case the Full Bench held that in the last four lines of section 9 of Regulation V of 1812 the words "from whatever cause" refer to the amount of the rent specified. And it follows from the Regulation that all sums of money or receivable for [illegible] above the rent specified and payable at the time of the Permanent Settlement could not be sued for. In the case of *Sheo Narain Singh v. Jay Kali Singh*,* the sums claimed were [illegible] which were in existence, and were found to be payable by the lease (sic) and this finding [illegible] could not be entertained with on a special appeal. Moreover when we consider that so far back as 1774 [illegible] before the Permanent Settlement, a lease was asked to execute [illegible] they must be held to be [illegible] of their nature. They were by name and [illegible] distinct from the rent, were apparently on state on the face, and they were received by the landlord not as rent but as cesses. The distinction was marked in the plaint where they were set out by name after the rent and in sharp contrast with it. Yet the sums were decreed as rent.

The Judges said:—

"In the case before the Full Bench that Regulation did not support the plaintiff. On the contrary it was directly opposed

* 1 C. L. R. 15 Calc., 820.

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Rama Prasad Singh

Bachaswar Koer

to their claim. In the present case the Regulation has support the plaintiff's case because he does not appear to have agreed and understood to pay any cesses, but simply sues which the tenant agreed to pay or the proceeds arise from the terms of their contract. It seems to me that the payment of these items arises from the payment of the rent itself formed part of the consideration with which the tenancy was created. Therefore the plaintiffs were entitled, by virtue of Regulation V of 1812, to demand and recover these items being as fact part of the rent agreed to be paid although not so described in the instrument executed at the time. Section Act 'rent means whatever is payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land let to the tenant.' There is nothing new in this but the Legislature merely what has always been understood by the word rent. What is rent must depend upon the circumstances of each particular case as to what the agreement was. In the present case, upon which the District Judge has come to as well as we by the plaintiff's claim."

I must respectfully dissent from this judgment and with I do so, I think it necessary to state the facts and I shall give my reasons for my dissent. In the Full Bench, as in this case, the suits were collection suits. But one the cases were admitted and had been decided in favour of the plaintiffs, the cases were entered among the cases to be heard. I have already stated how the Regulation appeared to me on the one hand than the other. Nor does the Regulation require that the cesses in dispute should be arbitrary *and* uncertain. The words are "arbitrary or uncertain", and to find that the cesses are not arbitrary is not sufficient to satisfy the requirements of the case, it is opposed to two propositions laid down in the Full Bench case,—that it cannot be maintained that a cess which is demanded and retained as rent, and that the last four lines of the Regulation invested a class of cesses merely as to rent, and I do not refer to them. Nor can I bring myself to acquiesce in the proposition which I think is involved in the decision, that rent is demandable by the landlord from the consideration upon which a tenancy is created, a fixed rent and that only. The object is to ascertain what is

[illegible] Radha Prasad Singh [illegible]

[illegible] on law, partly on custom and usage. [illegible] with the view taken in the decision [illegible] to that called rent [illegible]

[illegible] not the opinion of Mr. Shore, who says [illegible]

[illegible] *Jahiri*; the former [illegible] which are appropriated for the maintenance of [illegible] subsequently imposed upon it."

[illegible]

1880.

Gulab Chand Singh
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Sir Lewis Tupper

[illegible] through Regulation VIII [illegible] Regulations.

Regulation II [illegible] follows :—

[illegible] pargana [illegible] and paying a specific amount [illegible] Rajah [illegible] year 1781 [illegible] Rajah [illegible] and [illegible] that [illegible] and [illegible] was to [illegible] and [illegible] annual [illegible] that year, [illegible] only [illegible], this sum or specific rate should constitute what the [illegible] or highs."

[illegible] Regulations [illegible] that in the [illegible] Regulations [illegible] all persons [illegible] must be [illegible] grant *pottahs* to their under-renters and *ryots*," in which [illegible] shall be executed by the *ryots* and under-renters of a [illegible] be endorsed upon [illegible] description.

The same view is set [illegible] Regulation VII [illegible] 9, and it comes to this that up to the time of making a settlement the Government [illegible] parties [illegible] as were [illegible] and could [illegible] no [illegible] to *shrotis* or [illegible] proposition, I set forth the lease granted under the Re-

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to the case of Bengal, North-West and in Behar. It is the case from which the Regulations

"A pattah or engagement shall specify the name of the person receiving the land, the rent to be paid by him, and the period for which the lease or rent for the entire area of the estate shall be given. It may also specify the rent to be paid for each field or parcel of land, and the crop or description of crop which may be grown thereon, and the rent to be paid for each description of crop or the manner in which the rent to be paid for each description of crop will be taken.

"Kind or mixed specification of rent."

Nakdi or money rent.

For [illegible] rupees per bigha, or the amount of rent per bigha at which [illegible] per bigha—Re. 37 8 0.

Ditto. Kewar rate: Bonga for the more valuable articles of cultivation [illegible] bigha (whether of 3 kuchcha gatha or pukka measurement or "dhurwat"), viz.,

	Rs.	As.	P.
Sugarcane 10 bighas at 2 rupees per bigha	20	0	0
Tobacco 2 bighas at 6 rupees per bigha	12	0	0
Mixed vegetables 1 bigha at 2 rupees 1 anna per bigha	2	1	0
	34	1	0

In this case rent is used in the sense of ground rent only, and it was held that the provisions of the rent rules for [illegible] Act VIII of 1885 are [illegible]

Now I think the express words of the Regulations as to the consolidation of rent and revenue into one sum weakened by the argument that because the rent [illegible] of Regulation V of 1812 sometimes use the words in the same [illegible] "clauses" and "engagements," the rent so ascertained [illegible] more than one lump sum. It is a general phrase and includes every [illegible] thing which the parties except rent. It must be borne in mind that the power to frame a specific set of rules and that the land could be let for a term and there might be changes in regard to these matters as in the case set out above. Moreover, we know that in some Regulations before Regulation V of 1812, when rent was consolidated into one lump sum, the engagements between [illegible] are referred to [illegible] similar

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terms. Examples of these are to be found in Regulation XIX of 1793, section 9, and in Regulation VII of 1799, section 10, clause 8, where the words bear a strong resemblance to those in Regulation V of 1812, which brought them to refer to Regulation VIII of 1793.

The Judges in the case decided by the Full Bench that there was no distinction between the Regulations and hence that it must be looked to in each case whether any sum is or is not an *abwab*. It is true that there is no express definition of *abwab* in the Regulations. Yet as the whole question in a tenant is frequently declared to be the question what are or are the items that must be left to the landlord included in the gross rent. Even the wide meaning attributed to it in 1793 one year after the passing of Regulation V of 1812. In this year a glossary of legal terms was compiled for the use of the Judges of the Sudder Dewanny Adawlut for the assistance of Bengali readers of the Fifth Report and in it *abwab* is defined as follows:

"This term is particularly used to distinguish the taxes imposed subsequently to the establishment of the real or original standard rent of the lands from the taxes imposed at the time of the settlement. In many places they had been incorporated with the rent and a new standard assumed as the basis of succeeding assessments."

This is, I think, an accurate description of the term *abwab* as found in the Regulations, and it would seem a quick test in doubtful cases, and such as I think it is the cases in this case and in the case under decision were both

It is for these reasons I respectfully submit that the decision in *Radha Nand Singh v. Ram Narain* [1] is wrong. It seems to me to be in direct conflict with the decision of the Full Bench and that both judgments cannot stand as an expression of the same law. I think the sums of *Rs.* 10 and *Rs.* 5 stipulated to be paid were *abwabs*, and the stipulation to pay them was void.

I may add that a perusal of the Full Bench decision in the case referred to by the Judges of the Full Bench in the case of *Kartik Mahto Singh v. Ramjoy Chuckerbutty* [2] shows that the tenure held by the defendants in No. 7,543-14-6 under the head of *Zamin* was, in excess of a

[1] I. L. R., 15 Calc., 825.
[2] 7 Sel. Rep. N. S. 1.

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half annas in each rupee on the amount of the farming jama under the *Kabuliat* dated 22nd Bysack 1241. That suit was dismissed. Three Judges of the Sudder Dewanee Adawlut in giving judgment held as follows:—

"The *Kabuliat* provides that the farmers should pay such sums, over and above the stipulated jama as may be realized on the mofussil cesses under the head of *Zilla* cesses. Section 3 Regulation V 1812, provides that the imposition of arbitrary or indefinite cesses, whether under the denomination of *abwab*, *mathut* or other denomination, is illegal and that all stipulations of that nature should be judged by the Courts to be void and void."

The case of any question arising in regard to the case of *Radha Kissen Chowdhry v. Hur Nath Singh* and it affirms the principle that all agreements of the nature referred to in that case are null and void. The answer to the question referred to the Full Bench must, I consider, be that the amounts sued for under the head of *cesses*, *sayr* and *abwab* are *abwabs* and are not therefore, recoverable and the appeals should be dismissed.

PARKER, J.—I am of the same opinion.

PRINSEP, J.—I entirely agree.

GHOSE, J.—This was a suit for rent for the years 1290 to 1294, at the rate of Rs. 22-2 annas per year. The defence was that the yearly rent was not Rs. 22-2 annas but Rs. 18-10-6 and that the difference between Rs. 22-2 annas and Rs. 18-10-6 was made up of certain illegal cesses such as *sayr kista*, *sayr* and *khurach*, which could not be legally recovered.

The suit was instituted after the Bengal Tenancy Act came into operation.

The main question upon which the parties went to trial in the Courts below was whether the rent was Rs. 22-2 annas or Rs. 18-10-6, and upon this question both the Courts below found in favour of the defendant. They were of opinion that the "actual rent" was Rs. 18-10-6, and that although the defendant had for many years paid very much at the rate of Rs. 22-2 annas, still that sum was made up of the rent and illegal cesses, that these cesses had not been consolidated with the rent in accordance with the provision of Regulation VIII of 1793, and that therefore they could not be recovered as rent

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The learned Judge has however held that *dasto* is not an illegal cess, and it can therefore be recovered and he has reserved to the plaintiff the liberty of bringing a separate suit for *sayr*

The plaintiff appealed to this Court and the Division Bench, before whom the case came on for hearing, has referred the following question to a Full Bench, viz. —

"Whether the portions of the claim that are objected to as coming under the denominations *sayr*, *sey* and *dastur* are all gal cesses, or whether they are recoverable as rent by reason of their having been paid for a long time along with rent without any specification in the rent receipts."

It appears to me that [illegible] arrived at by both the Courts below, the amount sought to be [illegible] and the question as to the legality or otherwise of the items of *sayr*, *sey* and *dastur* [illegible] to this second appeal. The question between the parties was with regard to the rent of the tenure held by the defendant and it has been found that it was Rs 18-10-6, and not Rs 24 as was said that the difference between these two figures was in respect of the rent of the tenure, though paid along with [illegible] but [illegible] as such

But as the majority of the Judges who constitute the Full Bench think that the question should be answered, I hereby state my views.

Section 71 of the Bengal Tenancy Act is as follows —

"All impositions upon tenants or by the landlord in addition to rent, whether they are called cesses or by any other name, other than those specially authorized by this Act, shall be illegal and void, and no suit for the recovery of any such payment shall be maintained."

And "rent" is defined in section 3 clause (5) to mean "whatever is lawfully payable or delivered in money or kind or both by a tenant to his landlord on account of the use of land held by the tenant." This definition, as I understand it, means in other words, what has always been understood to be the meaning of rent, the consideration to be paid or delivered by a tenant to his landlord for the use of land held by the tenant.

In this case the actual rent [illegible] Rs 18-10-6 and the other items claimed are what have been [illegible]

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years, under the denomination of *cesses, abwabs* etc., in addition to the rent.

There is nothing to show that these items ever formed any part of the consideration for which the land was leased to the defendant, for if they did, they would, I think, be really *rent*, though described in the *Zemindar's* papers under other denominations. They were apparently *abwabs* imposed subsequent to the rent being fixed at Rs. 18 10 0, and it is not proved that the *ryot* at any time agreed to pay an enhanced rent including the said items as part of the rent.

The word *abwab* is not defined either in the Bengal Tenancy Act, or in the Regulations which have been repealed by that Act. When the East India Company obtained the *Dewanee* of Bengal they found that a variety of taxes called *abwabs, mahsuls*, etc., had been at various periods levied in addition to the *asul* or original ground rent by the Government from the *Zemindars*, as also by the *Zemindars* from the ryots. And from the reports that were published by the officers of the Company after investigation into the Revenue System it would appear that in the time of the Emperor Akbar a *dasair jama* or standard assessment was fixed upon the principle of division of the gross proceeds between the sovereign and the ryots in certain proportions. This standard assessment was from time to time augmented. But notwithstanding the standard assessment, various taxes were subsequently imposed upon the *ryots* by the farmers of the land revenue (*Zemindars*), as also by the *subahdars*. Vesting upon these farmers. And these taxes were called *abwab jama* in contradistinction to the *asul jama*, or original rent, at which the land was supposed to have been rated in the time of Akbar or an ancient rent fixed at some later period. The *subahdars abwabs* were, it is said, generally levied upon the standard assessment in certain proportions from the *Zemindars* and the latter were authorized to collect them from the ryots in the same proportions but, as a matter of fact, the *Zemindars* were left to their own discretion and arbitrary will to make any new demands as they pleased, and there was no fixed rule or principle in levying these impositions. (See Harington's Analysis, Vol. II, pages 19, 60, and the 5th Report to the House of Commons, Vol. I, pages 103 105 to 108, 275 292, 300 and 491.)

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In the year 1772 14th May a Regulation was passed, whereby it was declared that a settlement should be made for five years that the farmers should not receive larger rents from the ryots than the stipulated amount of the pottahs, that the payments made by the farmers to government should, in like manner, be ascertained and established and that no *sirkhats* or assessments under the denomination of *mowzee, sayr* etc., or any other *abwabs* should be imposed upon the ryots, and those articles of *sayr* which were of recent establishment should be scrutinized, and such as might be found to be oppressive and pernicious should be abolished and that all *sirkhats* and *abwabs* be totally discontinued (Arts. 10 to 18).

In the same year the Committee of Circuit while making a settlement for five years in some parts of Bengal found it necessary "to form an entire new code or explanation of the divers and complex articles which were to compose the collections. These consisted of the rent or original ground rent and the *Sayr* or *Abwab* which appeared to be most oppressive were abolished, and the rest were retained, they being considered part of the land rents." And in order to prevent the latter from exacting by contract or impose the Committee prepared forms of pottahs which the farmers were to give to the ryots specifying the conditions of the lease and the payments to be made on account of the rent. (See Harington's Analysis, Vol. II, pages 19 and 20).

Subsequently in the year 1781 5th June another Regulation[1] was passed by the Governor General in which it was declared that, whereas notwithstanding the orders of Government in 1772 prohibiting the imposition of *Sayr* or *abwab* or other taxes had been imposed by the Collectors and it was necessary to enforce that rule and that if any new taxes be imposed he was to decree to the party so paid double the amount extorted.

We then find that Lord Cornwallis while recommending a Permanent Settlement of Revenue in Bengal stated in his Minute, referring to Mr Shore's Minute on the subject, that

"the rents of the ryots by whatever rule or custom they may be demanded shall be specified as to their amount that the

[1] Colebrooke's Supplement to the Digest of Regulations and Harington's Analysis Vol. II, 20.

[2] Harington's Analysis Vol. II, 181 [illegible]

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landlords shall be obliged to grant *pottahs*, in which that amount shall be inserted, and that no *ryot* shall be liable to pay more than the sum actually specified in the *pottah*."[1]

And—

"every *abwab* or tax imposed over and above that sum is not only a breach of that agreement, but a direct violation of the established laws of the country."[2]

Further on he says:—

"the Zemindar may sell the land, and the cultivator must pay to the purchaser. Neither is prohibiting the landholder to impose new *abwabs* or taxes on the lands in cultivation tantamount to saying to him that he shall not raise the rents of his estate. The rents of an estate are not to be raised by the imposition of new abwabs."[3]

The policy of the Government then was, as I gather from what has been already stated, that whatever may be payable as rent should be specified in the *pottah* to be granted by the landlord, and that no new *abwabs* should be imposed.

We then find that in section 51 of Regulation VIII of 1793 it was laid down that—

"the imposts upon the *ryots* under the denomination of *abwab*, *mahut* and other appellations from their number and uncertainty have become intricate to adjust, and a source of oppression to the *ryots*; all proprietors of land and dependent *talukdars* shall revise the same in concert with the *ryots* and consolidate them with the *assul* or true specific sum."

The next section 52 provides that—

"no actual proprietor or dependent *talukdar*, or farmer of land, shall impose any new *abwab* or *mahut* upon the *ryots*."

Section 57 lays down that—

"the rents to be paid by the *ryots*, in whatever rate or cost on they may be engaged, shall be specifically stated in the *pottas* which in every possible case shall contain the exact sum to be paid."

Section 58 provides that the proprietor of the land or dependent *talukdar* shall prepare the form of *pottahs* to be

[1] Harington's Analysis, Vol. I, 185, Fifth Report, Vol. I, 314.
[2] Harington's Analysis, Vol. II, 184, Fifth Report, Vol. I, 318.

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given to the right and obtain the appointment of the Collector. Section 61 says that in the event of any matters being referred by any proprietor or *ryot* for or engagements wherein the consolidation of the *sud-ahmal*, etc., shall appear not to have been made within the time limited by section 58, they are to be re-enquired.

This was the law until the year 1812. The object that the legislature had in view in 1793 was to put down the exaction of new cesses and to make it compulsory upon the landholder to consolidate the then existing cesses with the rent. And probably, they intended also that there should be but one sum embodying all the items of payment, fixed and specified in the *pottah* as the rent. But then section 1 Regulation V of 1812, in contemplation as we think of the Regulations of 1793, which provided that the Collectors and Judges should prepare forms of *pottahs* and obtain the sanction of the Collector thereto and authorizes them to grant *pottahs* in such forms as the circumstances of the case might appear to them to require, laid down as follows —

"Provided however that nothing herein contained shall be construed to sanction any legal process for the recovery of arbitrary or indefinite cesses, whether under the denomination of *mamool*, *muktut*, or any other denomination. All pleas of the above nature shall be rejected by the Courts of Judicature to be null and void, but the Courts are enjoined to maintain and give effect to the definite conditions of the engagements contracted between the parties or in other words, enforce payment of such sums as may have been specifically agreed upon between them."

It will be observed that the section prohibits the imposition of *arbitrary* and *indefinite* cesses, and says that any contract or stipulation of *that* nature shall be null and void. Now the words which follow are to be construed with reference to explaining what they really intended to lay down. I cannot think that the intention was to provide that if the parties agree to any arbitrary and definite sum or sums as cesses, that stipulation or agreement shall be enforced. The expression "such sums as may have been specifically agreed upon" should be construed in contradistinction to the words "imposition of arbitrary or indefinite cesses." As I have already stated when the last Judge

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Company assumed the [illegible] of taxes under the [illegible], etc., were being [illegible] by the Zamindar according to their own will and discretion, without any fixed rule or practice. [illegible] was the object of the Government to put a stop to such arbitrary [illegible] to impress upon it to prohibit the levying of [illegible]. If my construction I have put be not correct, I [illegible] will what was the real intention of the section beginning with the words "but the Courts shall notwithstanding, etc." was put in by amending the section was to be construed, how would it then be expressed?

In the case of [illegible] decided by the Full Bench of the Court Mr. Justice Mitter [illegible] judgment was concurred in by Prinsep and [illegible] Justices. [illegible] to be matters not clearly define what an [illegible] was. I think it must be understood that a [illegible] which are [illegible] under the Regulation [illegible] the [illegible] at all. It seems to me that the Regulation without defining clearly what an [illegible] but [illegible] the determination to the Court which was [illegible] to have. I am [illegible] to the Regulation the power of [illegible] which would justify us to treat the [illegible] cess of Rs. 10 as part of the special rent although the [illegible] in the plaint and entered [illegible] as "[illegible] accounts as rent."

In that case the plaintiff [illegible] recovery of the amount as rent as a suit [illegible] other [illegible] 'cesses' not having been [illegible] in the village from time immemorial. It was contended that these [illegible] existed from before the Permanent Settlement and were therefore recoverable, notwithstanding the provisions of section 1 Regulation VIII of 1793, and further that they were not [illegible] although [illegible] as such in the grant but [illegible] of the rent. The Full Bench rejected both these contentions, and Mr. Justice Mitter held, as already mentioned, that what was an [illegible] must be left to the determination by the Court in each case upon the evidence but that in the case before them he could not hold that the disputed items were part of the rent. No doubt that learned Judge in a

* I. L. R., 10 Calc. 176

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subsequent passage, while referring to the last four lines of section 3, Regulation V of 1812 runs, "but the Courts shall notwithstanding maintain and give effect to the debute clauses in the engagements contracted between the parties, or in other words, enforce payment of such cesses as may have been specifically agreed upon between them save that the words 'same specified' refer to the amount of the rent specified." But this passage must be read with what had preceded and which I have already referred to.

The Judicial Committee go on affirming that decision observed as follows:

"The first question seems to be this: Are these payments over and above rent properly so called, cesses within the meaning of the word as used in the Regulation VIII of 1793?

They are described on the patni as 'usual cesses,' and they are described as 'besides the former cesses.' It appears to these learned Judges that the High Court were perfectly right in treating them as cesses and not as part of the rent. The payments have been and for a long time how long does not appear. They are said to have been according to long standing custom whether that means that they were payable at the time of the Permanent Settlement or not is not plain. If they were payable at the time of the Permanent Settlement they ought to have been recorded and will be rent under section 8 of Regulation VIII of 1793. Not being so recorded the cesses now in question must be exempted from all that Regulation. If they were not payable at the time of the Permanent Settlement they were [illegible] under the exemption of new abwabs in section 15, and they were to that case illegal. * * * *

What the Judicial Committee say is simply this: the plaintiff expressly claims these items as *abwabs* of the nature that at the time of the Permanent Settlement they should have been consolidated with the rent under section 8 of Regulation VIII of 1793; if they were not payable at that time they are *abwabs*, and therefore illegal under section 15. And they further say that the High Court were right in treating them as *cesses* and not as part of the *rent*.

I do not understand that they intend to go any way beyond what Mr Justice Mitter said in his judgment, and I have drawn

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as it is said they have done but nothing more and except the sum reserving every sum of money could be recovered as payable for the use of rent of land and that an agreement to pay anything beyond the sum reserved might be a lawful consideration for the case, and I see no ground

It appears to me that if in any given case the Court finds that any portion of the sum agreed to be paid is a lawful consideration for the use and occupation of any land, that is to say, if it is even a part of the rent though not described as such it would be open to us in holding that it is not *penal* and is recoverable by the landlord

And it is worthy from the point of view that the case of *Public Works Commissioners* was decided That was a case of government property leased under the Crown Lands Act and under which the rent had to be at a certain amount per acre, and the other terms of the lease were respectively designated as *reserved rent* and the Divisional Court (Lord Denman and Coleridge JJ) held that the sum agreed to be paid by the lessee for the purchase of the fixtures and *emblements* were recoverable because they were not *reserved rent* and therefore were not penal, but were something which the lessee was bound to pay and however were formed part of the consideration for the lease, and were in fact part of the rent agreed to be paid, though not described as such The case was decided upon the terms of section 3 Regulation VII of 1871 and not with reference to section 74 of the Bengal Tenancy Act the lease having been executed before that Act was passed The judgment in the case was delivered by Trevelyan J, also one of the Judges who formed the Full Bench in case of *Mahomed Hossein* And I may here observe that it was not intended thereby to hold that anything that is not reserved and included is recoverable although it may not be part of the *rent* In that case both the elements were supposed to be present viz that the items in question were rent of an ordinary or moderate character and secondly they formed part of the rent agreed to be paid Later, however, Jackson J was that having more carefully examined the subject I have come to the conclusion that we were not

* I L R 16 Calc 825
* I L R, 11 Calc, 173

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right in ordering that [illegible] were part of the [illegible] property. They were, I now think, *absurde*.

As regards the [illegible] claimed in the suit now before us it is [illegible] that had been realized on previous [illegible] and as to are not before us [illegible] nor [illegible] that would be suggested with the [illegible] [illegible] *Gujar Pirthi Pal Singh*. However that may be, the question whether [illegible] Bengal Tenancy Act [illegible] may be [illegible] [illegible] has [illegible] a matter of fact [illegible] actual rent [illegible]

As regards [illegible] that it cannot be seen would in this case [illegible]

Appeal dismissed.

[illegible] adverse [illegible] that [illegible] necessary nothing to entitle the [illegible] may have been [illegible] [illegible] [illegible] [illegible] whether such or whether it is an illegal addition to [illegible] [illegible] See *Radha Charan v. Gulabi Chand* I. L. R. [illegible]

I. L. R. [illegible]

MOHESH NARAIN

v.

NAWBUT PATHAK.

Reported in I. L. R., 12 Calc., 507 : L. R. I. A. 187.

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April 29

The following judgments were delivered by

HANDERSON, J.—The question arising on this appeal relates to the rights of a co-sharer against a person who holds a lease under other co-sharers. Having refused to join in granting the lease, can he enforce any rights against the lessee under the other co-sharers, in respect of the use of the joint property?

The appeal is filed by Mohesh, one of the plaintiffs in the Court below, against a decision of the Sub-Judge awarding him royalty to the extent of ⅛ths or all materials removed by the defendant Nawbut from the Tinpahar quarries: there is also a cross objection filed on behalf of Nawbut, who contends that he is not liable to render an account to the plaintiff or to pay royalty on the stone gotten.

The plaintiff was one of the joint-owners of an estate which comprised the hill known as Tinpahar Hill on which the defendant worked a quarry.

At one time Nawbut had held a lease from all the joint owners, which had expired before suit. There had been a quarrel with Mohesh, and the result of an extremely complicated series of transactions was that at the time the suit was brought Nawbut was, as the learned Sub-Judge has found, a lessee under half the proprietors, Mohesh who with his co-plaintiffs represented a six annas share, or 2 annas ancestral share of himself and the minor plaintiffs, and four annas, acquired under a lease from a four annas co-sharer, having declined to join in the lease to Nawbut. It is unnecessary to discuss the respective rights of Mohesh and Nawbut, because the Sub-Judge's finding is not questioned on this point.

Mohesh gave Nawbut notice not to quarry stones on Tinpahar Hill. Nawbut under his lease from the other proprietors claimed a right to quarry there, and declined to comply with the notice.

[1] Present: Harington, J. and Mookerjee, J.

The result was that the present suit was brought and the plaintiffs alleging that the stone raised were the undivided property of themselves and the several parties defendants amongst whom are the defendant Nawab [illegible] contract an account against the first party defendant Nawab [illegible] all the stones quarried and carried away from Dumatar Hill and an injunction and damages.

The learned Judge was of opinion that the plaintiff was entitled to an account and having found what the prevailing rate of royalty for stone was, directed the defendant to render an account of the stones and to pay the royalty on the royalty calculated at the prevailing rate.

For the purposes of this suit the lessee must be regarded as being as precisely the same position as the lessors, if therefore Mahesh was entitled to damages or an injunction against the co-sharers or to call upon them to render him an account of the stone gotten, then he was entitled to enforce these rights against the lessors. If on the other hand what had been done by the lessors would, if done by the co-sharers have given Mahesh no right of action against them, then he can have no rights as against the lessors.

On behalf of the plaintiff appellant it is contended that Mahesh had no undivided six annas share of the coal to be won and is therefore not entitled to have an account taken of what has been done as *Lala Jhanda* and the payment over to him of six annas share. On the other hand it is contended by the defendant respondents that there was no coal in the hill for Mahesh to get at the time the lease was granted. That as much as the lessee has not quarried any thing approaching a ten annas share of the stone there is no necessity to satisfy Mahesh's six annas share if he will only take it.

The case of *Lala Jhanda* [illegible] is to the point. There one of either a joint or an undivided family had the lessee of two undivided third shares in coal from a mine belonging to three co-owners. He agreed with the two co-owners, who were his lessors to pay a royalty at the rate of [illegible] per ton on the coal to be raised by the lessors for royalty calculated on two-thirds of the amount of coal which he got, and he kept a hand [illegible]

[illegible]

[illegible] I. L. R. 20 Pat. 83

[illegible]
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royalty on one thousand tons which he got and that was to be set apart for the third co-owner who had not joined in granting the lease and he left unworked in the mine an amount equivalent to that three co-owners' one-third of the coal. In a suit by the third co-owner it was held by Brett, J., that, although the lessee had acted within his strict rights, he was liable to render an account to the plaintiff of one-third of the value of all the coal brought to the pit's mouth less the cost of bringing it there.

This decision turned on the principle enunciated in the Statute 4 Anne, c. 16, s. 27, by which it was enacted that one joint-tenant or tenant in common should be liable to account against the other as bailiff for receiving more than comes to his just share.

It was not the defendant's case that he had only taken the two-thirds of the coal which he was entitled to take under the lease and had left one-third more that had been gotten by the plaintiff. Had that been his case he must have accounted to his co-owner for a royalty on one-third of the coal, which he brought to the pit's mouth. His contention is, that for two-thirds of the royalty on all the coal mined, and by setting aside one-third of the royalty for the plaintiff, the lessee admitted that he had received more than two-thirds which seems to be just where matters stand, and therefore under the Statute of Anne he was held liable to account.

In the present case the defendant does not admit that he has received more than his just share so even if the principle enunciated in the Statute of Anne could be applied in this country the case would not be one at all for it being here the defendant's case that he has taken no more of the profits of the soil that he was entitled to take under the lease.

In the present case on what ground can the plaintiff base his claim? He cannot succeed in trespass because there has been no ouster or wrong. He cannot bring trover because there has been no destruction of the common property. The proper and ordinary use of it by the lessee seems to rest on it. Having used the common property in the way in which it is proper to use it, no action in trover will lie, even if the lessee should have got more than his share from the soil. I am unable to see how he can sue for money had and received unless there was an express or implied contract, and from the outset there was no consideration

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If the party [illegible] the plaintiff says he would not have [illegible] share the expense of conveying the stone.

To affirm the proposition that the plaintiff was entitled to an account would be to say that [illegible] might stand by and refuse to [illegible] the cost of cutting but he might sue his co-sharer upon the [illegible] of property and [illegible] help to bear a portion of the [illegible] This could not be the law.

[illegible] such a question to be supposed under the circumstances [illegible] stone [illegible] or which case it might be said that a [illegible] these rights [illegible] the profits. But [illegible] of an injunction—see *Lumley v. Wagner*[1]

[illegible] property [illegible] the joint property of all the co-sharers. I think that Nawbut is entitled to all the profits which [illegible] and [illegible] from [illegible] the joint property [illegible] by a proper [illegible] to the [illegible] property [illegible] and [illegible] and [illegible]

In *Hardwicke v. Vernon*[2] [illegible] not to be held to [illegible] the Statute of [illegible] The cost properly [illegible] profits, it does not follow that Nawbut [illegible] more than his share of the joint property [illegible] prop mined to [illegible] and [illegible] he has taken from the joint property.

In my opinion [illegible] account against Nawbut [illegible] property nor has the joint property been [illegible]

[1] (1852) 1 De G M & G 604.
[2] (1808) 14 Ves 501

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can carry stones for the road so obtain the share of the joint property.

There is no implied covenant to account to Mahesh for a share of the stone quarried for that must rest on the proposition that an implied covenant to account to Mahesh for a share of the stone was quarried for Mahesh's benefit at his request. If that were so, there must be an implied promise by Mahesh to pay for the cost of quarrying his own share whether the quarrying is a paying concern or not. It is Mahesh's case that there is no such liability.

The judgment and decree of the Subordinate Judge in favour of the plaintiff must be set aside and the suit dismissed.

The judgment in favour of the defendant on his claim for Rs. [illegible] against the plaintiff has not been questioned and must stand.

A large amount of the paper book [illegible] from pages 7 to 250 is concerned with the value of land and is not printed.

We assess the hearing fee at Rs. 300.

Mookerjee J. I agree with my learned brother that the decree passed by the Subordinate Judge is erroneous and must be reversed.

The facts which have given rise to the litigation out of which this appeal arises need be stated only so far as they are necessary for the determination of the principal question argued before us. They do not admit of any reasonable doubt or dispute. The plaintiff appellant and the second party defendants respondents, are the owners of a mahal known as Rajnahal varied Tenpahar, pargana Kendulara, parts of Keonjhar. The mahal was leased out by the ancestors of the defendant first party, who is the principal respondent to this appeal, for the purpose of quarrying and stone-cutting operations on various occasions, the first of which was for a term of two years and the second for a term of three years which expired on the 13th March, 1897. Upon the termination of the second lease, the first party defendant, Nawbat Pathak, obtained a fresh settlement from the co-sharers of the plaintiff in respect of their undivided ten-annas share, but the plaintiff declined to accept the engagement in respect of his six-annas. Nawbat however continued quarrying operations as before. On the 21st June, 1897, the plaintiff served a notice upon Nawbat asking him to stop the works and to render an

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[illegible] the [illegible] of the [illegible] In April [illegible] the plaintiff [illegible] the [illegible] against Narbat [illegible] the [illegible] of the plaintiff [illegible] further quarrying and carrying away [illegible] an account of all stones [illegible] and for the recovery of Rs. [illegible] the value [illegible] plaintiff's share [illegible] stones. The defendants [illegible], among others, that [illegible] had [illegible] the plaintiff [illegible] that the plaintiff was [illegible] quarrying [illegible] his own [illegible] Narbat had [illegible] of the stones [illegible] plaintiff could not ask for anything more than his [illegible] share [illegible] under [illegible] of the Civil Procedure Code [illegible] to set off against the demand of the plaintiff Rs. 17 [illegible] to him from the plaintiff. The learned Subordinate Judge held that the plaintiff was [illegible] share of the [illegible] and [illegible] the [illegible] hewn and unfashioned stones. The accounts were then taken, and it was found that the [illegible] Rs. 17 [illegible] plaintiff for the recovery [illegible] Rs. [illegible] Against this [illegible] the plaintiff [illegible] the [illegible] that the [illegible] proceeded on an erroneous principle, and the first defendant has [illegible] of the Code of Civil Procedure [illegible] that the plaintiff [illegible] The question [illegible] which the extent and character [illegible] the enjoyment of joint property, is one of great [illegible] if answered against the appellant, would [illegible]

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any dispersion of the property upon which the former might to be assessed. But the subject is by no means free from difficulty as the right of a co-tenant to execute a lease or mortgage, has been from the subject of judicial discussion and decision, after a careful examination however of the arguments advanced on both sides I have arrived at the conclusion that the position taken up by the respondent is well founded on reason and principle, and must be upheld.

The general rule is that every co-owner of joint property has a right to the reasonable enjoyment thereof in some of the ordinary methods of reaping profits from property of that nature and under certain circumstances, and that so long as he does not account to or injure his co-tenant or to the extent of mutual enjoyment of the joint property the law does not impose upon him an obligation to render an account to his co-sharer. In support of this position reliance is placed on a passage from Kunjo on Partition, page 417 and a similar passage in Freeman on Tenancy and Partition, 2nd edition section 111 A, where that learned author summarises the law on the subject as follows: "As a general proposition, each co-tenant is entitled to use and every covenant is forbidden to injure or destroy the common property. There are however, certain exceptions to this general right to enjoy the common property. Thus where a co-tenant commits waste or destruction and in the case of mineral property there can be no valuable use without a removal and in effect a destruction of a part of the common property. So also if the co-tenants may deem terminate the tenancy, when the other may be compelled to do so. The property is also only of no value except for the purposes of use, it can be used and the only use which its owners ever contemplated for it, and of which it is susceptible, is one of the removal from it of some part of its only element of value. Through such removal its value must be diminished, and, if sufficiently long continued, must be exhausted. The co-tenants, who come to use the mine, must either be deprived of the use thereof or if allowed to use, must assume a risk and expense and incur the liability to account with the others according to the use proves profitable or the non-assenting co-tenants must either join in the mining operations, or submit to see by the others which will consume or destroy a part of the property. As a rule already opened must have

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been intended to be used [illegible] be readily [illegible], and as the [illegible] here [illegible] exists in contemplation of [illegible] co-tenants generally [illegible] as is consistent with the [illegible] the latter [illegible] seems to be that [illegible] enter upon and work [illegible] doing, [illegible] The learned Vakil for the appellant [illegible] contended that one of the [illegible] tenants [illegible] valid licence to a stranger to [illegible] remove the materials, [illegible] of the rights of [illegible] that the licensee holds to account for [illegible] reliance is placed upon the case of [illegible] upon the [illegible] carefully [illegible] which regulate the enjoyment of joint property, nor is it in reality [illegible] the case referred to which [illegible] at first [illegible] seem to favour the contention, will be found [illegible] to be distinguishable [illegible] which completely differentiates it from the [illegible] that case, the plaintiff [illegible] In respect [illegible] which was [illegible] which [illegible] tenants [illegible] of two [illegible] Under this licence [illegible] two-thirds of the [illegible] was raised [illegible] kept by the [illegible] licence was [illegible] the plaintiff [illegible] bill against his co-tenants and the licensee, praying for an enquiry as to the value of the coal [illegible] and an account against all the defendants as [illegible] and receiver, and for damages. Meanwhile, [illegible] the plaintiff [illegible] a suit against him [illegible] estate had already been [illegible] for hearing in 1874 [illegible] suit, the plaintiff had not asked [illegible]

* (1876) L. R. 20 Eq. 91

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ation the fact that two of the coowners through their manager had carried away a part of the substance and the partition had been effected on the assumption that the three co-owners were entitled to a moiety each in the remainder of the coal. Under these circumstances, Sir James Hannen, C.J., held that it was not destructive waste for a tenant in common of a coal mine to get coal or to license another to get the coal, if the working tenant does not appropriate to himself more than his share of the proceeds; that the working in the case did not consequently amount to a trespass; and the plaintiff's action, because the bill as against the co-tenants was confined to a decree against the defendants for an account of the coal at the pit's mouth of the coal raised by means of getting and carrying away and for payment of one-third to plaintiff. It is obvious that any other decree might have left the plaintiff in one of two grounds, namely, that he might ask for a partition and sue only as against his co-tenants, or that he was at perfect liberty to work the mine on his own account as much of it has been left untouched as was equal to his proper undivided share in the undivided property. Neither alternative however was admissible under the circumstances, not the first because the co-tenants of the plaintiff had already entered into a partition and a severance had been effected by means always open to the fact that two of the co-owners had carried away a part of the substance and the second, because in the late of the partition these the estate had ceased to be joint property and each co-owner had become entitled to three parts, one of which more belonged to the plaintiff. The severance by the partition was, therefore, not always an element of disturbance the existence of which was not to be presumed; and if the suit had been dismissed, the plaintiff would have been left without a remedy which would have been neither just nor necessary. I am unable to find, therefore, that Sir James Hannen intended to lay down as a broad proposition of law that if one of two co-tenants of a mine works it reasonably and properly, without the consent of the other but at the same time without any assertion of hostile title, and does not take more than his legitimate share of the whole property, he is still liable to render an account to his co-owner. Such a position as this seems to me not only unjustifiable, on

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principle by opposed to another case I shall shortly refer, and also some of the cases referred to in the judgment of [illegible] For instance, those portions of the judgment which say "No authority has been referred to, and I believe that none can be found to say that the rights of [illegible] in a mine, are not as extensive as can be supported by act of those tenants to [illegible] who [illegible] with the ordinary properties, provided access can be had to [illegible] The Statute of Anne [illegible] has recognised that principle and [illegible] which I know of has adopted it as a principle. What difference is there between a tree growing which the Court refuses to prevent a tenant from cutting at his pleasure, and a tree which by some operation of nature has become embedded and [illegible] Here is a temporary occupier to whom [illegible] of the ordinary kinds of the country property [illegible] at liberty to dig and carry away [illegible] In one respect only he is told that he must not appropriate to himself more than a share." Now the Statute of Anne, to which reference is made in the passage [illegible] provided for the case of a tenant or [illegible] against whom the latter had an [illegible] just above [illegible] and it seems to me that, but for the express [illegible] the tenant would [illegible] liable to account to the plaintiff, as he has taken [illegible] two-thirds of the entire coal and left enough for the plaintiff to work upon. In fact the case [illegible] was a division that he had reserved a certain part of the coal, but with some adjustment between the parties, the only question which in reality [illegible] was as to the principle upon which the [illegible] was to be measured. I must hold accordingly that the case of *Job v. [illegible]* cannot right be regarded as an authority for the broad proposition which has been laid down by the learned Judge for the [illegible] in question, but [illegible]

* (1877) L. R. 20 Eq. 90

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established the co-ownership it may be argued to assess the amount of damages.

The view of the rights and liabilities of co-tenants, which I have indicated, appears to me to be well founded on principle. It is perfectly clear that in the case of moveable property jointly owned each owner has a right to the possession of every undivided portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, only with the other or, in the language of Lord Coke, 'their occupation is undivided one of the other' (Co. Litt. Sec. 200). But it does not follow that a severance of joint property by one co-owner renders him liable to an action for damages by the other as though the severance were tortious and does not constitute an exercise of the rights of the co-owner. If there is a question of title to exclusion or user of property an action of ejectment cannot lie: if there is no destruction of the property no conversion: an action of trover is not the appropriate means of redress: nor does an action of account lie unless it is alleged and proved that the co-tenant concerned converted the joint property to his own use. In the case of moveable properties, the only mode in which they may be profitably used is to take from them valuable produce: and if this is done properly by one co-owner, so as not to interfere with the exercise of a similar right of the other co-tenant, I do not see upon what ground an liability may be imposed upon the one to account to the other. Indeed, if the opinion now prevails, there would be no mutuality, and any benefit of joint property would be an unattainable one, as the owner might be expenditure of capital and labour on advantages which he would be obliged to share with the other, but, if he incurred any loss, he would not be entitled to throw the burden upon his co-owner. I am fortified in the view I take by the principle deducible from the decision of the Exchequer Chamber in *Heath's Case*[1] overruling the decision of the Queen's Bench *Penn v. Hennessey*[2] and the decision of the House of Lords in *Jacobs v. Seward*[3] affirming the decision of the Court of Exchequer Chamber.[4] In the first of

[1] (1587) 4 Co. Rep. 27 b.
[2] (1584) 1 Q.B. 280.
[3] (1872) L.R. 5 H.L. 464.
[4] (1870) L.R. 4 C.P. 328.

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these two cases Mr. Burn Parker [illegible] that of there are tenants-in-common, and [illegible] possesses the property [illegible] Statute of Anne answers [illegible] shift to his co-tenant [illegible] of [illegible] more than some to [illegible] but [illegible] "There are many cases [illegible] rents are made and [illegible] taken by [illegible] tenant [illegible] was that he has received more than [illegible] to [illegible] shares. For instance if one [illegible] occupies an [illegible] and [illegible] the whole of the [illegible] the [illegible] [illegible] made as [illegible] the [illegible] and [illegible] [illegible] exceeds the value [illegible] the rent [illegible] for the [illegible] portion of the land — a [illegible] [illegible] why [illegible] vexatious [illegible] and [illegible] [illegible] the [illegible] of the [illegible] is to be [illegible] accounted for and [illegible] the profits [illegible] where [illegible] other, if [illegible] [illegible] has been [illegible] and [illegible] [illegible] to [illegible] of Law could [illegible] a [illegible] [illegible] the [illegible] would have been [illegible] until [illegible] had [illegible] [illegible] by the mutual agreement of the co-tenants? In taking all the produce [illegible] cannot be [illegible] to [illegible] [illegible] [illegible] which he [illegible] [illegible] [illegible] to be [illegible] in [illegible] the remuneration for his own labour and capital, to which a tenant has no right? In support of this [illegible] learned Judge [illegible] [illegible] [illegible] *Il Hossein v. [illegible]*, that [illegible] [illegible] [illegible] [illegible] [illegible] by keeping out [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] cannot prevent the other from [illegible] [illegible] [illegible] [illegible] terms of paying him rent,—an opinion, which I [illegible] was followed by Lord Macnaghten [illegible] [illegible] Hossein Ismail in *Kennedy* v. *the Trafford*? In the ground of [illegible] cases referred to, *i.e.*, [illegible] [illegible] the [illegible] [illegible] [illegible] the common property [illegible] [illegible] [illegible] [illegible] and carried away by [illegible] [illegible] [illegible] [illegible] other could not maintain trespass against [illegible] [illegible] [illegible] the growing crops did not [illegible] [illegible] [illegible] [illegible] tenant-in-common. Lord Halsbury [illegible] [illegible] [illegible]

(1908) 2 Pn. [illegible]
(1907) [illegible]
1871 [illegible] L. R.

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so long as a tenant continues to pay the rent he cannot lawfully be deprived of his holding by the landlord, and that even the rent due is not in itself, and nothing is done which beats the benefit of the other covenant contained in the lease." There no action will lie, because it can follow that property so long as it can continue and not destroyed, that is another question arises under the Statute of Anne. The Lord Chancellor referred in support of this view to the case of the whale, *Fennings v. Lord Grenville*[1] where it was held that the conversion of a chattel (captured whale) by a tenant for life amounted to its general and potential appropriation to the use, though it changed the form of the substance, not a destruction of the subject matter and consequently tenant would be under such circumstances. See also *Bowes v. Wood*[2]

In the cases which have become a number in cases of this description are now examined and cases put back to the most recent case before the American Courts. In the first of these, *Arnold v. Mundy*[3] the question arose between two landowners in possession of a field of which one owned an undivided two-thirds and the other the remainder. The defendant who had cut grass growing upon the land was sued by the plaintiff, who owned the undivided one-third of the value of the grass appropriated. He knew it was wrong that he had not taken more than his share, and that he was not guilty of any waste of the land itself was had been or was himself from entering upon the Crown property and carrying the same. Mr Justice Berry who delivered the judgment of the Supreme Court of Minnesota, held that the plaintiff was not entitled to succeed, and after referring to the case of *Hewson v. Peirce*,[4] and the *M'Kinnon v. Penson*[5] quoted the following passage from Freeman on Cotenancy, section 258 as containing an accurate statement of the law on the subject. "As each co-tenant has at all times the right to enter upon and enjoy every part of the common estate this right cannot be

[1] (1806) 1 Taunt 241, 9 R R 732
[2] (1850) 4 Y & C Exch 42, 54 R R 450
[3] (1878) 25 Minn 222; 33 Am R 470
[4] (1831) 17 Q B 7 4
[5] (1850) 8 Ph 134

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impaired by the fact that another of the co-tenants absents himself or has not chosen to claim his right to an equal and common enjoyment. It would be inequitable to compel a co-tenant in possession to account for the profits realized out of his skill, labour and business enterprise, when he has no right to call upon his co-tenant to contribute anything towards the production of those profits, nor to bear his proportion, when, through bad years, failure of crops or other unavoidable misfortunes, the working of the estate resulted in a loss, instead of a profit, to the one in possession. In the second case, *Mc Coul v. Hubbard (no surface Water Company)*,[1] the reasoning which underlies this lesson was applied to the case of a mine, and it was held that, where one of several tenants-in-common of a mine is working it in the usual way, and not excluding his co-tenants, he cannot be called upon to account to them in an action for damages as for waste, nor restrained from thus working the mine. Mr. Justice Mckinstry, who delivered the judgment of the Supreme Court of California, after an elaborate review of the authorities English and American, observed as follows: "The tenants-in-common of a mine may occupy it for the purpose contemplated by all, even though a portion of the soil or ore be removed. Each tenant has the right to use the mine, and as was intimated by the Supreme Court of Pennsylvania in *Jones v. Goodall*[2] so long as an estate is used according to its nature, it is no valid objection that the use is consumption, and it is no fault of the tenant that it is not more enduring. The taking of ore from the mine is rather the use than the destruction of the estate. The results of the tenants' labour and capital are in the nature of proceeds or profits, the partial exhaustion being but the accidental consequence of the use." The learned Judge then dealt with the question of the grant of an injunction restraining the defendant from proceeding with the mining operations, and after holding that the injunction must be refused continued as follows: "The occupation by one tenant so long as it does not exclude his co-tenant, is but the exercise of a legal right. The money he invests at his own risk. If his transactions result in a loss, he cannot call upon his co-tenant for contribution,

[1] (1863) 24 Cal. 134; 49 Am. Rep. 641.
[2] (1854) 24 Pa. 162.

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Mahoney Marvin, to Marshall Paddock.

and if they result in a profit, his co-tenant is not entitled to share in such profit. The demand of the plaintiffs is not for a sum due by way of rent from defendant as the tenant of their interest, nor is it for a proportionate share of an amount received by the defendant for the use and occupation of the premises by third persons, nor is an account sought as an incident to a claim for partition, nor is the present an action brought to recover a portion of the profits acquired by the expenditure of defendant's money, treating him as the agent of plaintiffs in developing the common property. There is no pretence of an averment of any actual contract between plaintiffs and defendant, whereby the latter was authorized to act for the former. On the contrary, it is expressly alleged in the complaint that the acts of defendant were against the will of plaintiffs and without their consent. If the appropriation by the defendant of the net proceeds of his enterprise be considered as merely the legitimate perception of the profits, the action cannot be maintained as an action for an account." The view set forth in these two cases is substantially in agreement with that taken by the Court of Appeals of New York in *Le Barron* v. *Babcock*,[1] and is not inconsistent with that adopted in the cases of *Early* v. *Friend*,[2] *Bird* v. *Bird*,[3] *Annely* v. *De Saussure*,[4] *Holloway* v. *Holloway*,[5] and *Appeal of Palmer*,[6] which are all distinguishable on the common ground that in each, the co-owner, who was called upon and directed to render accounts, had been in possession of the joint property to the ouster or exclusion of his co-tenant. In the last of these cases, the Supreme Court of Pennsylvania laid down that as between tenants-in-common of an opened and developed slate quarry, the compensation which the tenant out of possession is entitled to receive from the tenant in possession taking out slate, is to be measured by the market value of the slate in place or in a state of nature; but from an examination of the judgment it appears that the Court was not called upon

[1] (1890) 122 New York 153; 19 Am. St. Rep. 488.
[2] (1850) 19 Grattan. 21; 78 Am. Dec. 649.
[3] (1875) 18 Fla. 876; 21 Am. Rep. 796.
[4] (1857) 26 South Car. 497; 4 Am. St. Rep. 726.
[5] (1868) 97 Miss. 623; 10 Am. St. Rep. 339.
[6] (1889) 126 Pa. 24; 15 Am. St. Rep. 632.

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to decide the question of the liability of the co-tenant in possession to render an account of profits, because the parties agreed that there was such liability, founded apparently upon a Statute of 1850, which subjects tenants-in-common in possession of mineral lands to accountability to their co-tenants for minerals taken out. I may further add that the case of *Murray* v. *Haverly*,[1] in which it was held that one of the co-tenants of a coal mine cannot grant a valid license to a stranger to enter, mine for, and remove coal, on the ground that the exercise of such right is an invasion of the rights of the non-assenting co-tenants, was, as pointed out in *McCord* v. *Oakland Q. M. Co.*[2] decided upon the special provisions of a Statute, which authorized a tenant to bring trespass or trover against his co-tenant, who should "take away, destroy, lessen in value or otherwise injure" the common property.

Upon a review of these authorities, I think the following propositions are deducible :—

(1) A tenant-in-common cannot be held liable to his co-tenant for damage for use and occupation of the joint property, unless there has been waste or an ouster of his co-tenants.

(2) When the tenant in possession has prevented his co-tenant from obtaining from the premises such profits as they were capable of yielding, or has taken possession of the whole and used them as his own, and, thereby made a profit, he must account, either for the fair rental value of the profits, or be liable for mesne profits ; for one tenant is bound to account to another only as his bailiff, under contract express or implied.

(3) Where one tenant-in-common occupies the joint property, without any assertion of hostile or exclusive title on his part, and without claim on the part of his co-tenants to be admitted into possession, he is under no obligation to account, for he has a right to such occupancy.

If these principles are applied to the facts of the case before me, the conclusion is irresistible that the plaintiff cannot succeed ; he does not complain of ouster or exclusion from the enjoyment of the joint property, nor is there the remotest suggestion that the defendant has taken more than his

[1] (1873) 70 Illinois 320

[2] (1883) 64 Calif. 134 ; 49 Am. Rep. 688 (691).

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share of the total quantity of stone, for as the learned Subordinate Judge puts it, a dozen centuries of quarrying will not visibly affect the hill. Under these circumstances, I must hold that the plaintiff is not entitled to any relief.

Reference was made at the Bar to the cases of *Watson* v. *Kanchand*,[1] *Lachmeeser* v. *Manowar*,[2] and *Balvantrav* v. *Ganpatrav*.[3] None of these, it is conceded, is directly in point; the first case is clearly distinguishable, as the tenant-in-common in possession had occupied more than his share of the land, and was made liable to pay compensation; the second and third cases, so far as they go, support the view taken by me. In the second case,[4] Lord Hobhouse, in reversing the decree of the High Court, which had directed an account of the profits, observed: "But if the defendant's use of the landing places and the river is consistent with joint possession, why should the plaintiffs have any of the profits? They have not earned any, and none have been earned by the exclusion of them from possession, as was done by the Watsons in the case cited. By the defendant's acts they have lost nothing and have received some substantial convenience. It will be time enough to give them remedies against him, when he encroaches on their enjoyment." In the third case,[3] Mr. Justice West held that a co-tenant may lawfully enjoy the whole property in any way not destructive of its substance so as to amount to an ouster of the other co-tenants, and whatever a co-tenant may do himself, he may license another to do, so that, if all the co-tenants are exercising acts of possession, their rights *inter se* would be to an account of the profits realised and a distribution of them according to their proportions of the ownership.

The result, therefore, is that the appeal must be dismissed and the cross objection decreed; the suit will stand dismissed with costs in this Court and the Court below. As the right of the defendant to the 175 rupees claimed by way of set-off has not been disputed before us, he is entitled to a decree for that sum, with interest at 6 per cent. per annum from the date of

[1] (1890) I. L. R., 18 Calc., 10.
[2] (1891) I. L. R., 19 Calc., 253.
[3] (1883) I. L. R. 7 Bom. 330.
[4] (1891) I. L. R. 19 Calc. 253., at p. 265.

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the written statement to the date of realization. The hearing fee in this Court is assessed at Rs. 300. The cost of preparation of that portion of the paper-book, which consists of the account-books, must be disallowed, as they were wholly unnecessary for the purposes of the appeal.

Appeal dismissed. Cross-objection allowed.

NOTE.

Reference may be made to the case of *Ananda Chandra v. Parbati Nath*, 4 C. L. J., 108, in which the question was discussed of the right of a co-owner to ask for demolition of buildings erected on joint lands by his co-sharers. It was pointed out that the plaintiff who complains of the act of his co-owner cannot obtain a decree for demolition of buildings or for joint possession unless he can establish that he has sustained some substantial injury by reason of the act of which he complains; the Court will not interfere unless it is proved that injury has accrued to the plaintiff by reason of the erection of the building, and that he took reasonable steps in time to prevent the erection.